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**Family and Medical Leave Act
Regulations: A Report on the Department
of Labor's Request for Information;
Proposed Rule**

DEPARTMENT OF LABOR**Employment Standards Administration****Wage and Hour Division****29 CFR Part 825**

RIN 1215-AB35

Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information

AGENCY: Employment Standards Administration, Wage and Hour Division, Department of Labor.

ACTION: Report on comments from the public.

SUMMARY: The Department of Labor's Employment Standards Administration/Wage and Hour Division undertook a review of the Family and Medical Leave Act ("FMLA" or the "Act") and its regulations, and published a Request for Information ("RFI") in the **Federal Register** on December 1, 2006 (71 FR 69504). The RFI asked the public to assist the Department by furnishing information about their experiences with the Act and comments on the effectiveness of the FMLA regulations. More than 15,000 comments were submitted in response to the RFI. The following report summarizes comments the Department received from its RFI.

ADDRESSES: A complete copy of this report is also available at <http://www.dol.gov/esa/whd/fmla2007report.htm>. It may also be obtained by writing to Richard M. Brennan, Senior Regulatory Officer, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Richard M. Brennan, Senior Regulatory Officer, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 693-0066 (this is not a toll free number).

SUPPLEMENTARY INFORMATION:**Foreword**

No employment law matters more to America's caregiving workforce than the Family and Medical Leave Act (FMLA) of 1993. Since its enactment, millions of American workers and their families have benefited from enhanced opportunities for job-protected leave upon the birth or adoption of a child, to deal with their own serious illness, and

when needed to care for family members.

After nearly fourteen years administering the law, two Department of Labor studies (1996, 2001) and several U.S. Supreme Court and lower court rulings, the Employment Standards Administration's Wage and Hour Division issued a Request for Information (RFI) on December 1, 2006.

The RFI asked the public to comment on their experiences with, and observations of, the Department's administration of the law and the effectiveness of the regulations. More than 15,000 comments were received in the next few months from workers, family members, employers, academics, and other interested parties. This input ranged from personal accounts, legal reviews, industry and academic studies, surveys, and recommendations for regulatory and statutory changes to address particular areas of concern.

There is broad consensus that family and medical leave is good for workers and their families, is in the public interest, and is good workplace policy. There are differing views on whether every provision of the law is being administered in accordance with the statute and with congressional intent. It is also evident from the comments that the FMLA has produced some unanticipated consequences in the workplace for both employees and employers.

A report of this kind is a unique step. Normally, the organization of comments received in response to a Departmental Request for Information would first be seen accompanying proposed changes to the rules. There are no proposals for regulatory changes being put forward by the Department with this Report. Rather, what we hope this Report does is provide information for a fuller discussion among all interested parties and policymakers about how some of the key FMLA regulatory provisions and their interpretations have played out in the workplace.

Finally, our thanks to the thousands of employees, employers, and other members of the public who participated in this information gathering by sharing their views, their research, and, in some cases, very personal comments. We greatly value those insights.

Victoria A. Lipnic,
Assistant Secretary of Labor,
Employment Standards Administration.
June 2007.

Executive Summary

The Family and Medical Leave Act of 1993 (FMLA) opened a new era for American workers, providing employees

with better opportunities to balance work and family needs. This landmark legislation provided workers with basic rights to job protection for absences due to the birth or adoption of a child or for a serious health condition of the worker or a family member.

For women dealing with difficult pregnancies or deliveries, or parents celebrating the arrival of a newborn or adopted child, the FMLA provides the opportunity to participate fully in these significant life events. For other workers—especially those who struggle with health problems or who are primary caregivers to ill family members—the FMLA has made it possible to deal with these serious challenges while holding on to jobs, health insurance, and some measure of economic security.

Background: What the Law Covers

The Family and Medical Leave Act of 1993, Public Law 103-3, 107 Stat. 6 (29 U.S.C. 2601 *et seq.*) (the "FMLA" or the "Act") was enacted on February 5, 1993 and became effective on August 5, 1993 for most covered employers. The FMLA entitles eligible employees of covered employers to take up to a total of twelve weeks of unpaid leave during a twelve month period for the birth of a child; for the placement of a child for adoption or foster care; to care for a newborn or newly-placed child; to care for a spouse, parent, son or daughter with a serious health condition; or when the employee is unable to work due to the employee's own serious health condition. *See* 29 U.S.C. 2612. The twelve weeks of leave may be taken in a block, or, under certain circumstances, intermittently or on a reduced leave schedule. *Id.* When taken intermittently, the Department's regulations provide that leave may be taken in the shortest increment of time the employer's payroll system uses to account for absences or use of leave, provided it is one hour or less. 29 CFR 825.203(d).

Employers covered by the law must maintain for the employee any preexisting group health coverage during the leave period and, once the leave period has concluded, reinstate the employee to the same or an equivalent job with equivalent employment benefits, pay, and other terms and conditions of employment. *See* 29 U.S.C. 2614. If an employee believes that his or her FMLA rights have been violated, the employee may file a complaint with the Department of Labor ("Department") or file a private lawsuit in federal or state court. If the employer has violated an employee's FMLA rights, the employee is entitled to reimbursement for any monetary loss

incurred, equitable relief as appropriate, interest, attorneys' fees, expert witness fees, and court costs. Liquidated damages also may be awarded. *See* 29 U.S.C. 2617.

Who the Law Covers

The law generally covers employers with 50 or more employees, and employees must have worked for the employer for 12 months and have 1,250 hours of service during the previous year to be eligible for leave. Based on 2005 data, the latest year for which data was available the time the Request for Information was published, the Department estimates that:

- There were an estimated 94.4 million workers in establishments covered by the FMLA regulations,
- There were about 76.1 million workers in covered establishments who met the FMLA's requirements for eligibility,¹ and
- Between 8.0 percent and 17.1 percent of covered and eligible workers (or between 6.1 million and 13.0 million workers) took FMLA leave in 2005.²
- Nearly one-quarter of all employees who took FMLA leave took at least some of it intermittently.

Recent information submitted to the Department also suggests that FMLA awareness was higher in 2005 than in prior years. This information supports the Department's estimate of increased FMLA usage since prior studies of FMLA.

Request for Information and Prior FMLA Reports

After nearly fourteen years of experience implementing and administering the new law, the Department's Employment Standards Administration/Wage and Hour Division undertook a review of the FMLA regulations, culminating in the publication of a Request for Information ("RFI") on December 1, 2006.³ The RFI asked the public to assist the Department by furnishing information about their experiences with FMLA and comments on the effectiveness of the current FMLA regulations. The RFI generated a very heavy public response: More than 15,000 comments were submitted, many of which were brief emails with very personal and, in some cases, very moving accounts from employees who had used family or medical leave; others were highly-

detailed and substantive legal or economic analyses responding to the specific questions in the RFI and raising other complex issues.⁴

Twice before, the Department has published reports about the FMLA and its use. The statute established a bipartisan Commission on Family and Medical Leave to study family and medical leave policies. The Commission surveyed workers and employers in 1995 and issued a report published by the Department in 1996, "A Workable Balance: Report to Congress on Family and Medical Leave Policies." In 1999, the Department contracted with Westat, Inc. to update the employee and establishment surveys conducted in 1995. The Department published that report, "Balancing the Needs of Families and Employers: Family and Medical Leave Surveys, 2000 Update" in January 2001.⁵

Never before has the Department looked in such granular detail at the legal developments surrounding the FMLA and its implementing regulations, as well as the practical consequences of such in the workplace. The RFI's questions and subject areas were derived from a series of stakeholder meetings the Department conducted in 2002–2003, a number of rulings of the U.S. Supreme Court and other federal courts, the Department's own experience administering the law, information from Congressional hearings, and public comments filed with the Office of Management and Budget (OMB) as described by OMB in their three annual reports to Congress on the FMLA's costs and benefits.⁶

Unlike the 2000 Westat Report, the Department's Report on the RFI Comments is not an analysis or comparison of one set of survey data with another some years later. The RFI was not meant to be a substitute for survey research about the leave needs of the workforce and leave policies offered by employers. The record presented

here is different than the previous two Departmental reports because the RFI was a very different kind of information-gathering tool than the two previous surveys. Given the differences in data-gathering approaches, the depth with which the RFI looked at the regulations, and, of course, the self-selection bias by those who took the time to submit comments to the RFI, differences in the outcomes should be expected. Care must be taken to avoid improper comparisons of information collected in the RFI with data from the two surveys.

General Overview of the Report

Commenters consistently stated that the FMLA is generally working well—at least with respect to leave related to the birth or adoption of a child or for indisputably "serious" health conditions. Responses to the RFI substantiate that many employees and employers are not having noteworthy FMLA-related problems. However, employees often expressed a desire for a greater leave entitlement, while employers voiced concern about their ability to manage business operations and attendance control issues, particularly when unscheduled, intermittent leave is needed for chronic health conditions. Indeed, the overwhelming majority of comments submitted in response to the RFI addressed three primary topics: (1) Gratitude from employees who have used family and medical leave and descriptions of how it allowed them to balance their work and family care responsibilities, particularly when they had their own serious health condition or were needed to care for a family member;⁷ (2) a desire for expanded benefits—e.g., to provide more time off, to provide paid benefits, and to cover additional family members;⁸ and (3) frustration by employers about difficulties in maintaining necessary staffing levels and controlling attendance problems in their workplaces as a result of one particular issue—unscheduled intermittent leave used by employees who have chronic health conditions.

Many employees offered powerful testimonials about the important role the FMLA has played in allowing them to continue working while addressing their own medical needs or family caregiving responsibilities. Chapter I,

⁷ Many of these employee comments stated that there were no problems with FMLA and there should be no changes to the program.

⁸ Because comments on the need for expanded benefits concern matters outside the scope of the Department's authority and the purposes of the RFI, these comments are not covered in any significant detail in this Report.

¹ Recent data submitted to the Department on the size and scope of the FMLA's reach support these estimates. *See* Chapter XI of this Report.

² Recent data submitted to the Department support this estimate as well. *See* Chapter XI of this Report.

³ 71 FR 69504.

⁴ All comments are available for viewing via the public docket of the Wage and Hour Division of the Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Many comments are also available on www.regulations.gov. The names of individual employees have been redacted from the Report where any personal medical information was shared.

⁵ *See* "Balancing the Needs of Families and Employers, Family and Medical Leave Surveys, 2000 Update," Westat Inc., January 2001. *See also* the description of the 2000 Westat Report in Chapter XI of this Report. *See also* 71 FR 69510.

⁶ The 2001 report may be found at: www.whitehouse.gov/omb/inforeg/costbenefitreport.pdf, the 2002 report at: www.whitehouse.gov/omb/inforeg/2002_report_to_congress.pdf, and the 2004 report at: www.whitehouse.gov/omb/inforeg/2004_cb_final.pdf.

Employee Perspectives: Experiences in the Value of FMLA, is an important representative example of how meaningful the ability to use the Family and Medical Leave Act has been for employees. The Department could have written an entire report based simply on those comments.

But, no regulatory scheme, particularly at the outset, is perfect. In 1993, the FMLA was a brand-new employment standard and many of the concepts, particularly those that took effect in the final regulations, were borrowed from other areas of law or were completely new. Thus, it should come as no surprise that RFI commenters continued to debate some of the choices made by the Department as it sought to implement the statute in a manner consistent with Congressional intent.

As is evident from both the RFI record and from many of the legal challenges to regulatory provisions over the years, the debate continues on whether the Department successfully implemented the statutory requirements and Congressional intent, or struck the right balance in all places. That debate is reflected in Chapters II–XI. In many instances, commenters expressed the view that a certain regulation was “exactly what Congress intended,” while others said of the same regulation that “it could not possibly be what Congress intended.” Because of that, in order to provide context to the comments received, in many chapters legal background is provided and/or the evolution of a particular regulatory section is retraced through the rulemaking process. Indeed, many commenters did the same thing. While this is in some cases done in great detail, without that history it may be impossible to understand not just what suggestions are being offered, but why they are being offered. These historical summaries are not intended to endorse the legitimacy of any particular comment or suggestion.

As explained in the RFI, some of the issues brought to the attention of the Department in various forums over the years are beyond the statutory authority of the Department to address.⁹ Nonetheless, many commenters provided suggestions for statutory changes to expand the FMLA. Among others, and in no particular order, were comments on: providing paid maternity leave, covering the care of additional family members (e.g., siblings), changing the 75-mile eligibility test, reducing the coverage threshold below 50 employees, and providing coverage

for part-time workers. Because these comments are beyond the Department’s authority to address, we do not detail them in the chapters that follow.

Finally, this Report is not a catalogue of every comment received or every suggestion made about every part of the regulations. Nor is it a catalogue of every organization or group that submitted comments. We do believe that the comments selected for discussion are representative and the chapters that follow accurately reflect the record according to the most important subject matters presented—many of which, but not all, follow and detail the subjects and questions asked in the RFI. The chapters are designed to explain the questions asked in the RFI, provide background on the law where needed, and detail the feedback about the FMLA and the Department’s implementation of it as raised in comments from employees and employers.

Given the detailed presentations in many of the responses to the RFI, and when the comments are read and studied in the aggregate, certain observations about the record stand out. Those observations follow in this Executive Summary or are found in Chapter XI: “Data: FMLA Coverage, Usage, and Economic Impact”. We believe the observations included in this Report are evident from a plain reading of the thousands of comments received from both employers and employees.

The Department’s Observations Regarding the Comments

The Department is pleased to observe that, in the vast majority of cases, the FMLA is working as intended. For example, the FMLA has succeeded in allowing working parents to take leave for the birth or adoption of a child, and in allowing employees to care for family members with serious health conditions. The FMLA also appears to work well when employees require block or foreseeable intermittent leave because of their own truly serious health condition. Absent the protections of the FMLA, many of these workers might not otherwise be permitted to be absent from their jobs when they need to be.

At the same time, a central defining theme in the comments involves an area that may not have been fully anticipated: The prevalence with which unscheduled intermittent FMLA leave would be taken in certain workplaces or work settings by individuals who have chronic health conditions. This is the single most serious area of friction between employers and employees seeking to use FMLA leave. The

Department is cognizant that certain of its regulatory decisions and interpretations may have contributed to this situation.

Certain types of industries and worksites and their workers appear to be more impacted by unscheduled intermittent FMLA leave-taking than others and there is considerable tension between employers and employees over the use of this leave. The Department heard, in particular, from employers, and from the representatives of employees who work with them, whose business operations have a highly time-sensitive component, e.g., delivery, transportation, transit, telecommunications, health care, assembly-line manufacturing, and public safety sectors.

While many employer comments used the words “abuse” and “misuse” to describe employee use of unscheduled intermittent leave, the Department cannot assess from the record how much leave taking is actual “abuse” and how much is legitimate. In some cases, the use of unscheduled intermittent leave appears to be causing a backlash by employers who are looking for every means possible (e.g., repeatedly asking for more information in the medical certifications, especially in cases of chronic conditions) to reduce absenteeism.

Another area that generated significant comments is the current medical certification process. The Department recognizes that communication about medical conditions is essential to the smooth functioning of the FMLA in workplaces. However, none of the parties involved with the medical certification process—employers, employees, and health care providers—are happy with the current system. Employees are concerned about the time and cost of visits to health care providers to obtain medical certifications and the potential for invasion of their privacy. Employers, especially when it comes to intermittent leave use, seek predictability in attendance and are frustrated with medical certifications that do not provide meaningful guidance. Health care providers complain they cannot predict how many times a flare-up of a particular condition will occur.

Despite much work by the Department, it also appears that many employees still do not fully understand their rights under the law, or the procedures they must follow when seeking FMLA leave. For example, many employees are misinformed about the fact that paid leave can be substituted for, and run concurrently with, an employee’s FMLA leave. Even

⁹ See 71 FR 69504.

among employees who possess a general awareness of the law, many do not know how the FMLA applies to their individual circumstances. In turn, this failure in understanding may be contributing to some of the problems identified with the medical certification process, and with employers' ability to properly designate and administer FMLA leave. It is clear the Department has more work to do to further educate employees and employers regarding their rights and responsibilities under the law.

Summary of Chapters I–XI

Employee Perspective: Experiences in the Value of the FMLA (Chapter I)

Chapter I provides a representative sampling of comments received by the Department regarding the “value” FMLA provides to employees. In general, employees commented they were very happy to have the protections afforded by the FMLA. Many commented that the Act prevented job loss, allowed them to spend time with sick or injured family members, and, upon returning to work, encouraged a greater sense of loyalty to their employer. Some pointed out that their employers went above and beyond what is required by the law. Many employers also submitted comments that outlined advantages to complying with the FMLA and offering benefits beyond what the law requires.

The value of the FMLA was particularly noted by employees caring for both children and parents with serious health conditions; this observation was supported by employer comments, many of whom noted that they increasingly receive FMLA leave requests from employees with elder care responsibilities. Many employees commented that the FMLA would be more useful if it provided paid leave, if more time off was available, and if the program covered more types of family members, such as siblings, grandparents, etc.

Ragsdale Decision/Penalties (Chapter II)

This chapter discusses the impact of the Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.* on the FMLA implementing regulations. *Ragsdale* invalidated the “categorical penalty” in section 825.700(a) of the regulations, which provides that if an employer does not designate an employee's leave as FMLA leave, it may not count that leave against an employee's leave entitlement. Other courts have struck down similar “categorical penalty” rules in sections 825.110(d) (relating to deeming an

employee eligible for leave) and 825.208(c) (relating to designation of paid leave). Since *Ragsdale*, many courts have applied equitable estoppel¹⁰ principles when employers either fail to communicate required information or communicate incorrect information.

Employers commented that all categorical penalties should be removed from the regulations and that employers should be permitted to designate leave as FMLA leave retroactively. Some employers suggested that any penalty should be tailored to the specific harm suffered by the employee or suggested situations in which no penalty would be appropriate. Employees supported the current notice and designation requirements in the Department's regulations, with many noting that they suffer hardships when they do not know promptly whether the employer believes they are entitled to FMLA-protected leave. Some employee commenters suggested that employers be required to provide annual notices to employees regarding their FMLA eligibility status and periodic reports regarding any FMLA leave used. Employers expressed concerns that without some clarification they are unsure of their liabilities for failure to follow the notification requirements. Both groups expressed a need for the Department to clarify the impact of *Ragsdale* on the notification requirements in the current regulations.

Serious Health Condition (Chapter III)

The Department received many comments on the regulatory definition of serious health condition relating to a period of incapacity of more than three consecutive calendar days and treatment two or more times by a health care provider (sometimes called the “objective test”) contained at 29 CFR 825.114(a)(2)(i) and its interaction with 29 CFR 825.114(c) (which provides examples of conditions that ordinarily are not covered). Chapter III summarizes these comments. Many of these comments echoed (or had their origins in) earlier comments to the record the Department received in 1993 when promulgating its current regulations.

The Department received many comments from employees and employer groups who believe that the objective test is a good, clear test that is serving its intended purpose, consistent with the legislative history, while a common theme from many employers

was that the regulatory definition of serious health condition is vague and/or confusing. Moreover, comments from employer groups complained that there is no real requirement that a health condition be “serious” in the regulatory definition of serious health condition.

Many employee representatives felt section 825.114(c) imposes no independent limitation on the definition of serious health condition and therefore need not be changed. Other commenters took the very opposite tack—that the objective test extinguished Congress' intent to exclude minor illnesses and that the Department should breathe life into subsection (c) by making it more of a *per se* rule, as it was initially interpreted by Wage and Hour Opinion Letter FMLA–57 (Apr. 7, 1995).

Some employers offered to give meaning to subsection (c) by changing the period of incapacity in the objective test from “calendar” days to “business” days. Still other commenters suggested that the Department maintain the substantive language of both regulatory sections but explicitly adopt a recent court interpretation of the regulations that the “treatment two or more times by a health care provider” in section 825.114(a)(2)(i)(A) must occur during the period of “more than three days” incapacity. Some commenters suggested reconciling the two regulatory provisions by simply tightening the requirements for qualifying for a serious health condition under the objective test (e.g., increasing the number of days of incapacity required).

Unscheduled Intermittent Leave (Chapter IV)

Chapter IV of the Report discusses the use of unscheduled intermittent leave under FMLA. Based on the comments received, unscheduled intermittent FMLA leave is crucial to employees with chronic serious health conditions resulting in sudden, unpredictable flare-ups. Conversely, it is precisely the use of unscheduled (or unforeseeable) intermittent leave for chronic conditions that presents the most serious difficulties for many employers in terms of scheduling, attendance, productivity, morale, and other concerns. With respect to employer comments, no other FMLA issue even comes close.

The Act itself does not provide a definition of “chronic” serious health conditions. During the 1993–1995 notice-and-comment rulemaking phase, the Department filled in this gap, as the regulatory definition of “serious health condition” evolved in response to public comments urging that this

¹⁰“Equitable estoppel” is a legal bar that prevents one person from taking advantage of a second person where the second party is injured by reasonably relying on the misrepresentations (or silence when there is a duty to speak) of the first person.

definition specifically cover chronic conditions.

Regarding intermittent leave, the Act provides for the taking of leave in small blocks, or intermittently, but does not specify the minimum increment. 29 U.S.C. 2612(b)(1). In its regulations, the Department rejected any minimum limitations on intermittent leave, citing the statute, and stating a concern that such limits would cause employees to take leave in greater amounts than necessary, and thus erode a worker's 12-week leave entitlement. 60 FR 2236. The Department also predicted initially that incidents of unscheduled intermittent leave would be unusual. 58 FR 31801.

The Act sets out a clear, 30-day notice requirement for leave that is foreseeable, but for leave foreseeable less than 30 days in advance, the Act has a less clear, "as soon as practicable" notice requirement. 29 U.S.C. 2612(e)(2)(B). The Department, through its interpretive actions, has defined "as soon as practicable" to mean two working days after the need for leave becomes known.¹¹

Fourteen years later, the comments indicate that unscheduled intermittent FMLA leave for chronic conditions has become commonplace and it is difficult for employers to determine or monitor employees' incapacity when the chronic condition does not involve any active, direct treatment or care by a health care provider (*i.e.*, self-treatment by employees with chronic conditions such as asthma, diabetes, migraine headaches, and chronic back pain).

Employers expressed frustration about what they perceive to be employees' ability to avoid promptly alerting their employers of their need to take unscheduled leave in situations when it is clearly practicable for them to do so. A common example cited by employers involves ignoring mandatory shift call-in procedures even when the employee is fully able to comply, and then later reporting the absence as FMLA-qualifying after-the-fact. Thus, some employers allege, employees may use FMLA: (1) As a pretext for tardiness or to leave work early for reasons unrelated to a serious health condition, (2) to obtain a preferred shift instead of the one assigned by the employer, or (3) to convert a full-time position to a permanent part-time one. These employers believe the Department's regulatory interpretations have exacerbated this situation.

Other commenters said that when an employer is unable to verify that an employee's unscheduled absence is in fact caused by a chronic serious health

condition, and the employer cannot seek additional medical verification of the need for the absence, the employer cannot distinguish between employees who legitimately need FMLA leave and employees who misuse the protections of FMLA to excuse an otherwise unexcused absence from work.

Notice: Employee Rights and Responsibilities (Chapter V)

Chapter V of the Report summarizes comments received regarding the FMLA rights and responsibilities of employees. The comments to the RFI indicate that many employees are not knowledgeable about their rights and responsibilities under the FMLA. Even among employees who possess a general awareness of the law, many do not know how the FMLA applies to their individual circumstances. This reported lack of employee awareness may contribute to frustrations voiced by the employer community concerning employee notice of the need for FMLA leave. Employers and their representatives commented on employees not providing notice of the need for leave in a timely fashion and receiving notice without sufficient information to make a determination as to whether or not the leave is FMLA-qualifying.

The Medical Certification and Verification Process (Chapter VI)

The Department received significant comments regarding the FMLA medical certification process. These comments are discussed in Chapter VI. Generally speaking, all parties involved in the certification process—employees, employers and health care providers—believed the current process needs to be improved.

Many employers commented that they are frustrated with certifications that do not provide meaningful guidance regarding the employee's expected use of intermittent leave. They also noted that the current regulatory framework provides them with limited options for verifying that employees are using FMLA leave for legitimate reasons. Employers also stated they want to be able to talk directly with the employee's health care provider (without using a health care provider of their own) and feel that greater communication would allow decisions regarding FMLA coverage to be made more quickly.

Employees commented that employers are not using the existing FMLA procedures appropriately to challenge medical certifications and are instead simply refusing to accept certifications without seeking clarification or a second opinion. Some employees also claimed that their use of

unscheduled intermittent leave for chronic conditions seems to be causing a backlash among some employers who refuse FMLA coverage for any absences that exceed what is on the medical certification. Employees also expressed concern that increased communication between the employer and their health care providers could lead to an erosion of their right to medical confidentiality.

Finally, although the certification requirement calls for an estimate of the expected use of intermittent leave, health care providers commented that often there is no way they can furnish a reliable estimate of the frequency or severity of the flare ups and thus are unable to provide all the information required in the certification. Based on the comments received, employers, employees and health care providers almost universally believe the Department's model certification form WH-380 could be improved.

Interplay Between the FMLA and the Americans with Disabilities Act (Chapter VII)

A number of commenters discussed the relationship between the FMLA and the Americans with Disabilities Act ("ADA").¹² Although the ADA also may provide employees with job-protected medical leave, the legislative history of the FMLA indicates that Congress intended for "the leave provisions of the [FMLA to be] * * * wholly distinct from the reasonable accommodation obligations of employers covered under the [ADA]." ¹³ Nonetheless, the Department borrowed several important concepts from the ADA when finalizing the FMLA regulations. The practical realities of the workplace also mean that employee requests for medical leave often are covered by both statutes, thus requiring employers to consider carefully the rights and responsibilities imposed by each statute. Chapter VII summarizes the comments received by the Department regarding the interplay between FMLA and ADA.

Almost uniformly, employers and their representatives urged the Department to consider implementing more consistent procedures for handling and approving medical leave requests under the FMLA and ADA. These commenters argued that, in many instances—but particularly with respect to obtaining medical information—the ADA and its implementing regulations provided a "much better model" and struck a more appropriate balance between an employee's right to take

¹¹ See Wage and Hour Opinion Letter FMLA-101 (Jan. 15, 1999).

¹² 42 U.S.C. 12101-12117, 12201-12213.

¹³ S. Rep. No. 3, 103d Cong., 1st Sess. 38 (1993).

reasonable leave for medical reasons and the legitimate interests of employers. Many of these commenters cited their own experience in administering the ADA as support for the idea that additional limits imposed by the FMLA were unnecessary, particularly because both statutes require employers to review similar types of medical information and make determinations about an employee's ability to work based on that information. These commenters also noted that, in many instances, the same human resources person reviews an employee's absences under both statutes, thus further blurring the line between what an employer could permissibly do under each statute.

Other commenters, including unions and other employee groups, argued that the differences between the two statutory schemes were a direct result of the distinctively different purposes of each law. These commenters noted that the ADA is intended to ensure that qualified individuals with disabilities are provided with equal opportunity to work, while the FMLA's purpose is to provide reasonable leave from work for eligible employees. These commenters generally opposed implementing procedures they viewed as placing additional limits on the availability of FMLA leave, or increasing requirements under the FMLA medical certification process.

Transfer to an Alternative Position (Chapter VIII)

The RFI did not specifically ask any questions about an employer's ability to transfer an employee to an "alternative position" but the Department received many comments on this topic. These comments are discussed in Chapter VIII of the Report. Under the FMLA, an employer may transfer an employee to an "alternative position" with equivalent pay and benefits when the employee needs to take intermittent or reduced schedule leave "that is foreseeable based on planned medical treatment[.]" 29 U.S.C. 2612(b)(2). Section 825.204 of the regulations explains more fully when an employer may transfer an employee to an alternative position in order to accommodate foreseeable intermittent leave or a reduced leave schedule.

A significant number of employer commenters questioned why the regulations only permit an employer to transfer an employee when the employee's need for leave is foreseeable based on planned medical treatment as opposed to a chronic need for unforeseeable (unscheduled) leave. Many commenters saw no practical

basis for differentiating between foreseeable and unforeseeable need for leave in this context. In fact, many employers reported that the underlying rationale for the transfer provision—to provide "greater staffing flexibility" while maintaining the employee's same pay and benefits—is best served where the employee's need for leave is unforeseeable.

Substitution of Paid Leave (Chapter IX)

Chapter IX of the Report summarizes comments regarding the substitution of paid leave for unpaid FMLA leave. Under the statute, employees may substitute accrued paid leave for FMLA leave under certain circumstances. If employees forego the option to substitute paid leave, employers may then require such substitution.¹⁴ The legislative history indicates that Congress had two purposes in providing for the substitution of accrued paid leave for unpaid FMLA leave. First, Congress sought to clarify that where employers provided paid leave for FMLA-covered reasons, they were only required to provide a total of 12 weeks of FMLA-protected leave including the period of paid leave (i.e., employees could not stack 12 weeks of unpaid FMLA leave on top of any accrued paid leave provided by the employer). The second purpose of substitution of paid leave was to mitigate the financial impact of income loss to the employee due to family or medical leave.

A major concern of the employer commenters was that when employees substitute paid vacation or personal leave for unpaid FMLA leave, they are able to circumvent certain aspects of employers' existing paid leave policies, such as notification requirements, minimum increments of leave, seniority, or time of year restrictions. These commenters stated that employees substituting such paid leave for unpaid FMLA leave are, therefore, treated more favorably than those employees who use their accrued leave for other reasons. Employee commenters noted that the ability to substitute paid leave is a critical factor in their ability to utilize their FMLA entitlements, because many employees simply cannot afford to take unpaid leave.

The comments also identified a number of other issues affected by substitution of paid leave. For example, employers questioned the wisdom of the regulation forbidding substitution if employees are receiving payments from a benefit plan such as workers' compensation or short-term disability plans. On the other hand, employees

commented that they are improperly required by employers to substitute paid leave, despite contrary language in existing collective bargaining agreements providing employees with the right to decide when to use their leave.

Joint Employment (Chapter X)

Chapter X of the Report discusses comments regarding employer coverage under FMLA in cases in which a company utilizes the services of a Professional Employer Organization (PEO). Unlike a staffing or placement agency, PEOs generally are service providers that handle payroll and other human resource work for the employer and which, under the current regulations, may qualify in some circumstances as a primary employer in a joint employment arrangement.

The comments indicated that PEOs generally are not responsible for employment decisions like hiring, firing, supervision, etc. All of the comments in this area supported the view that the primary "employer" in these cases should be the client company that actually hires and uses the employees who are provided benefit services by the PEO. Thus, according to these comments, the client company, and not the PEO, should be responsible for the placement of employees returning from FMLA leave.

Data: FMLA Coverage, Usage, and Economic Impact (Chapter XI)

The Department received a significant number of comments on the usage and impact of the FMLA, including a variety of national surveys and numerous data on FMLA leave from individual companies or government and quasi-government agencies. This information, when supplemented by the data from the 2000 Westat Report (and despite its limitations), provides considerable insight and a far more detailed picture of the workings of the FMLA, and the impact of intermittent leave, in particular. Chapter XI of this Report provides a full discussion of the data received.

Several themes arose out of the data comments submitted in response to the RFI:

- The benefits of FMLA leave include retaining valuable human capital; having more productive employees at work; lower long-run health care costs; lower turnover costs; lower presenteeism costs; and lower public assistance costs.
- There are unquantifiable impacts on both sides. On the benefit side, the value of FMLA leave is often immeasurable. On the cost side, there

¹⁴ 29 U.S.C. 2612(d).

can be a negative impact on customers and the public when workers do not show up for their shifts on time.

- A significant number of workers, especially for some facilities or workgroups, have medical certifications on file for chronic health conditions, and the number is increasing.

- Unscheduled intermittent FMLA leave causes staffing problems for employers requiring them to overstaff some positions and use mandatory overtime to cover other positions. Both of these increase costs and prices.

- The lack of employee notification can cause some positions to go temporarily understaffed resulting in service or production delays. This not only increases costs in the short run but also may potentially impact future business.

- Unscheduled intermittent FMLA leave can adversely impact the workplace in a variety of ways, including missed holidays and time-off for other employees, lower morale, and added stress that can result in health problems.

Further, it appears that the Department's intermittent FMLA leave estimates presented in the RFI—that about 1.5 million workers took intermittent FMLA leave in 2005, and that about 700,000 of these workers took unscheduled intermittent FMLA leave—may be too low.

While the percentage of FMLA covered and eligible workers who take FMLA leave may appear to be low relative to the total workforce and the percentage who take unscheduled intermittent leave may appear to be even smaller, the record shows that these workers can have a significant impact on the operations of their employers and their workplaces for a variety of reasons. First, as a number of commenters pointed out, these workers can repeatedly take unscheduled intermittent leave, over nine hours per week, and still not exhaust their allocation of FMLA leave for the year (generally, 12 weeks \times 40 hours/week = 480 hours). Second, the record reveals that workplaces with time-sensitive operations, such as assembly-line manufacturing, transportation, transit, and public health and safety occupations can be disproportionately impacted by just a few employees who repeatedly take unscheduled intermittent leave. Third, the comments indicate that if the morale or health of workers covering for the absent employees on FMLA leave begins to suffer, either because they believe the absent workers are misusing unscheduled intermittent leave or from the stress caused by an increased

workload, these workers may in turn seek and need their own FMLA certifications causing a ripple effect in attendance and productivity.

Finally, the data indicate that if unscheduled intermittent FMLA leave is taken, most employers will be able to resolve these infrequent low cost events on a case-by-case basis by using the existing workforce (or possibly bringing in temporary help) to cover for the absent worker, and likely will view unscheduled intermittent FMLA leave as an expected cost of business. On the other hand, for those establishments and workgroups with a high probability (rate) of unscheduled intermittent leave and where the cost of such leave is high, the comments suggest that none of the measures that are typically used to reduce the risk and costs associated with unscheduled intermittent FMLA leave appear to work very well. These establishments, whose risk management systems (e.g., absence control policies, overstaffing, mandatory overtime) appear to be overwhelmed, are likely the employers reporting that intermittent FMLA leave has a moderate to large negative impact on their productivity and profits (1.8 to 12.7 percent of establishments according to the 2000 Westat Report). In addition, many of the traditional methods used to encourage good attendance or control absenteeism (e.g., perfect attendance awards or no fault attendance policies) may not be used if they interfere with FMLA protected leave. These employers may try to make it more difficult for their workers to take unscheduled intermittent FMLA leave by repeatedly questioning the medical certifications or asking for recertifications—creating tension in the workplace.

Conclusion

In those sections of the FMLA dealing with leave for the birth of a child, for the adoption of a child, and associated with health conditions that require blocks of leave and are undeniably “serious” (e.g., cancer, Alzheimer's, heart attack), the law appears to be working as anticipated and intended, and working very successfully. When addressing these areas, there is near unanimity in the comments—FMLA leave is a valuable benefit to the employee, improves employee morale, improves the lives of America's families, and, as a result, benefits employers. These aspects of the FMLA are fully supported by workers and their employers.

But to the extent that the use of FMLA leave has continued to increase in unanticipated ways, primarily in the area of intermittent leave taken as self-

treatment for chronic serious health conditions, the Department has heard significant concerns. These unanticipated facets of the FMLA are the source of considerable friction in the following areas:

- How serious is “serious”?
- What does “intermittent” leave mean and how long should it go on?
- What are the rules surrounding unforeseeable leave?
- How much information can an employer require before approving leave?
- What are an employee's responsibilities under the Act?
- What workplace rules may an employer actually enforce?
- How has other legislation, including the ADA and HIPAA, affected the FMLA?

Absent the protections of the FMLA, many workers with chronic conditions might not otherwise be permitted to be absent from their jobs. This is unquestionably a valuable right. But it is precisely the use of FMLA leave by a subset of these workers—those seeking unscheduled intermittent leave for a chronic condition—that appears to present the most serious difficulties for many employers in terms of scheduling, attendance, productivity, morale, and other concerns. As was clear from the record, these comments are not inconsistent with each other. These things are true at the same time.

The success of the FMLA depends on smooth communication among all parties. To the extent that employees and employers become more adversarial in their dealings with each other over the use of FMLA leave, it may become harder for workers to take leave when they need it most.

The Department hopes that this Report will further the discussion of these important issues and is grateful to all who participated in this information-gathering process.

I. Employee Perspective: Experiences in the Value of the FMLA

The chapters that follow in this Report deal in large part with the substantive comments from individual employers and employees, law firms, and groups representing employers and employees, assessing what works or does not work particularly well with specific regulatory sections of the FMLA. Because of that, it is easy to lose perspective about the overall value of the workplace protections provided by the Act. That value is best shown in the comments submitted by individual employees and, in some instances their employers or representatives. While it would be impossible for the Department

to catalog every comment it received in response to the Request for Information (“RFI”) about the value of the FMLA, this chapter provides a representative collection of comments recounting those personal experiences.¹ These comments also include some examples of best practices of employers in carrying out the FMLA—practices that often create or strengthen good relationships between employers and employees. These comments reflect the belief stated in the regulations that a “direct correlation exists between stability in the family and productivity in the workplace” and demonstrate that the underlying intent of the Act “to allow employees to balance their work and family life by taking reasonable unpaid leave” for certain qualifying family and medical reasons is being fulfilled. 29 CFR 825.101.

Many employees were grateful that the Act existed and that they were able to utilize the leave entitlement in a time of need. Some employees specifically commented that the Act helped them during difficult periods of caring for loved ones who were ill. For example, one employee wrote that she used FMLA leave twice, once to care for a seriously ill child and again “when my husband was injured in Afghanistan and needed assistance in his recovery[.]” An Employee Comment, Doc. 2666, at 1.² She noted that “without this [FMLA] protection, I probably would have lost my job and all its benefits[.]” *Id.* Another employee said he could not have cared for his ill wife without FMLA. An Employee Comment, Doc. FL18, at 1. “My wife * * * has a medical condition that is covered by the FMLA. I have used intermittent FMLA leave to take her to the doctor whose office is located approximately 4 hours away by car from where we live. I have been doing this on average once a month for approximately 3 years. I would not be able to do this without the FMLA.” *Id.*

One employee, whose comment echoed the sentiment that the FMLA allows employees to balance their work obligations with the need to care for their loved ones, appreciated how his family benefited from FMLA leave. “Presently, my sister is having to care for our ailing mother while holding down a job. The Family and Medical Leave Act is very important to her as well as her family in her continued effort to care for our mother in her final

days.” An Employee Comment, Doc. FL9, at 1. Another employee said, “I * * * recently returned from taking a two week FMLA [leave] to care for my elderly stepfather after open heart surgery. My family and I were appreciative that because of the FMLA I was able to request time to assist with his care and recuperation at home. We all have no doubt that my time was invaluable with his improvement once home.” An Employee Comment, Doc. 139, at 1.

Other commenters also noted the value of FMLA when they needed leave because of their own serious health conditions. For example, one employee said, “As a cancer survivor myself, I cannot imagine how much more difficult those days of treatments and frequent doctor appointments would’ve been without FMLA. I did my best to be at work as much as possible, but chemotherapy and radiation not only sap the body of energy, but also take hours every day and every week in treatment rooms.” An Employee Comment, Doc. 5798, at 1. Another employee, who used FMLA leave on several occasions for her own serious health condition, stated that she was “very thankful for the existence of the Family and Medical Leave Act (FMLA). As a two-time survivor of breast cancer, I have taken FMLA leave both on a continuous and an intermittent basis—continuous leave to recover from my surgeries (therapeutic and reconstructive) and intermittent for doctors appointments, radiation therapy, and chemotherapy treatments.” An Employee Comment, Doc. 234, at 1. Other employees specifically pointed out the value of the FMLA in allowing them to focus completely on recovery. For example, a correctional officer commented, “I was out of work for a short period of time due to a serious medical condition that was treatable. FMLA gives the employee the ability to tend to these concerns with their full attention, to recuperate without sacrificing their career [or] their livelihood.” An Employee Comment, Doc. FL87, at 1.

Several employees commented specifically about the value of intermittent leave under the FMLA. A railroad employee of thirty-six years said he uses intermittent leave to care for his wife, who suffers from Multiple Sclerosis (“MS”). An Employee Comment, Doc. FL115, at 1. Acknowledging the sporadic need for leave, the commenter said, “Since MS is an incurable disease without a schedule or any way of knowing when an episode is going to [occur], I cannot always foresee when I am needed at home. The

only time I know I am needed is when [my wife] has an appointment with her doctor. This is subject to change if she is unable to go to the doctor due to weakness.” *Id.* Similarly, an AT&T employee commented that intermittent leave under the Act makes it possible for her to care for her mother, who has Alzheimer’s disease. “I only take an hour here and there as needed. I try to work doctor appointments and other things around my work schedule. However, it is impossible to always do that. FMLA has been a life saver for me. Had I not had FMLA for this reason I don’t know what I would do.” An Employee Comment, Doc. 10046A, at 1.

Many employees commented that the Act helped save their jobs. For example, one employee, who commented that her child’s health condition sometimes keeps her out of work for several days at a time, said, “FMLA has tremendously helped my family. I have a child born w/[asthma], allergies & other medical issues. And, there are times I’m out of work for days[.]. If I didn’t have FMLA I would have been fired [a long] time ago. I’ve been able to maintain my employment and keep my household from having to need assistance from the commonwealth.” An Employee Comment, Doc. 229, at 1. Another employee said, “I returned home after three months [of FMLA leave] to be told I no longer had a job. I was told it would be unfair of me to expect my coworkers to cover for me so they were forced to hire a new employee * * * When I asked the manager about the previous assurances that my job would be held until I returned I wasn’t given a direct answer. I invoked the FMLA and was able to keep my job.” An Employee Comment, Doc. 61, at 1. A teacher stated, “Without [the FMLA], I couldn’t have cared for both of my parents at different times in their lives and kept my job * * * Because of the act I was able to keep my parents out of nursing homes and still keep my job to support them later. This is the best thing you can do for working families around our country.” An Employee Comment, Doc. 1181, at 1.

Similarly, an employee with a chronic serious health condition commented, “I can get sick at any time and need brain surgery. This can put me out of commission for a month or two. FMLA gives me the peace of mind that I cannot be fired after I have been in a job for a year. I cannot stress how monumental that assurance is.” An Employee Comment, Doc. 159, at 1. Another employee said, “Without the availability of FMLA I’m not certain of what would have happened to my family when my husband was diagnosed with ALS 5

¹ The Request for Information can be found at 71 FR 69,508 (December 1, 2006).

² The names of individual employees have been redacted from the Report where any personal or medical information was provided.

years ago. Thankfully it was there, so I could be with him as he was dying.” An Employee Comment, Doc. 4332, at 1. A union steward, using FMLA leave for his own serious health condition, commented that “FMLA not only allows me to take time off for * * * therapy/medical appointments but also allows [me] to take time off as needed when I have sporadic episodes in which the medicine does not work, needs to be fine tuned or changed which is essential to my well-being.” An Employee Comment, Doc. 4619, at 1. He further commented, “Without FMLA I would have been fired long ago[.] * * * FMLA saved my job and I also believe saved my life, and to this day gives me a sense of security against any discipline or termination based on my legitimate medical needs.” *Id.*

The FMLA appears to be particularly valued by employees caring for both children and parents with serious health conditions. A telephone company employee providing care for her asthmatic son and for her 84-year-old mother commented: “I am part of what is known as the ‘Sandwich Generation’[.] * * * I have had several occasions to use FMLA[.] * * * Without FMLA protection I would have lost my job.” An Employee Comment, Doc. R133, at 1. Another employee described taking leave for a three-month period for the birth of her child, then needing leave intermittently to care for her father “for a few days after each hospitalization” for his chronic heart disease. An Employee Comment, Doc. 6311, at 1. According to this commenter, “Knowing that I was protected meant I didn’t have to choose between my Father’s health and my job.” *Id.* at 1.

In a similar vein, one commenter who administers FMLA leave for her employer noted, “What I am seeing with increasing regularity are FMLA requests for employees to care for an elderly parent who is ill and not able to afford a caregiver to attend to his/her needs. These are usually for intermittent leaves that will allow the employee to chauffeur their parent to the doctor [or] attend to their parent post surgery. As our working population ages, [the need for leave related to] caring for elderly parent(s) will increase.” Doreen Stratton, Doc. 696 at 1. An employee agreed: “There are multiple factors putting stress on the American family, making the FMLA a good thing for families with children. Also, millions of baby-boomers are getting old, many of them without adequate retirement funds—so we will be seeing more family caregivers, not fewer.” An Employee Comment, Doc. 5473, at 1. As these comments show, the importance of the

FMLA is growing for this key group of employees and their employers. As one commenter put it, “In most families, since both parents have to work to support themselves and their children and perhaps their older parents, the more a company provides pay and good will towards a family[’s] caretaking abilities, the more that employee will be loyal to the company.” An Employee Comment, Doc. 5521, at 1.

In addition to these individual employee and employer comments, the American Federation of Labor and Congress of Industrial Organizations (“AFL–CIO”) conducted an “online survey among members of Working America, the Federation’s community-based affiliate in response to the RFI. Within a period of two weeks, over 1,660 members responded.” Doc. R329A, at 6. As a result of their survey, several hundred personal experiences were included in an Appendix to the AFL–CIO’s comment—a sampling of which is provided here:

- “My daughter was mauled by a dog. I had to take 2 months of leave (permitted under FMLA). Had FMLA not been in place, I would have lost my job for sure.”

- “FMLA has made a big difference to me. I have a chronic health condition along with being a single mother and have my aging mother living with me. I can’t imagine not being able to use this so that I know that my job will still be there whether I have a [reoccurrence] of my health condition or like when my 4 year old broke his leg.”

- “My step mother had a debilitating stroke. Since I work in social services, I was [the] best person in the family to assist her with setting up her benefits. My direct supervisor did not like it, but my request could not be denied. Human Resources was more than helpful in telling me how much vacation and sick time I had accrued. It was required that I use that up while I was on FMLA. I was paid for all but a week and a half of my leave. Without FMLA, I could not have taken the 5 weeks off work.”

- When my mother was diagnosed with lung cancer, my brother and I decided I would be the one to take her to all her appointments and therapy. I would have lost my job or had to leave it without FMLA. It was difficult for the people I worked with because it put a strain on the office, however, they were, for the most part, emotionally supportive as well.”

- “My mother was diagnosed with cancer and she had a stroke that left her paralyzed and wheelchair bound. With the help of the FMLA, I was able to take her to her appointments and tell the doctors what was going on with her

since I was her primary caregiver. I was able to be with her when she took her last breath and was grateful for the time I was able to [spend] with her until her death.”

Id. at 46–59.

Similarly, the Communications Workers of America submitted several hundred examples of their members’ personal experiences with FMLA “to illustrate the continued importance of the FMLA[.]” Doc. R346A, at 16. A representative sample of those experiences follows:

- “A Cingular employee with a good work record has Lupus which causes periodic flare-ups that prevent her from working and require weekly therapy and regular doctor visits. FMLA has allowed her to remain stress-free * * * because she does not need to worry about losing her job.”

- “A Pacific Bell Telephone employee with chronic lower back pain that prevents sitting or walking when it flairs up has been able to take FMLA leave when these symptoms occur without facing discipline for absence issues. As a result, this employee remains a productive and committed employee.”

- “A [Communications Workers of America] member reports that in 1995 his late wife was diagnosed with colon cancer. After she was operated on, she needed extensive chemotherapy. His employer allowed him to substitute paid leave for unpaid FMLA leave whenever he needed to go with his wife to chemotherapy treatments since she was unable to drive herself to or from these appointments. This made a big difference especially because some of the medical care was not covered by the employee’s insurance.”

- “An employee of AT&T has used FMLA leave to care for her husband, her son, her elderly mother and for her own serious health condition. She reports that she learned about the availability of FMLA leave from her union and the union representatives were very helpful to her in trying to understand complicated FMLA application forms and other related documents sent to her in connection with these leaves.”

- “An employee of AT&T used FMLA leave five years ago when her father developed a brain tumor that ultimately took his life. She states that ‘it was devastating to our family, but I am so grateful that, with the FMLA I was able to help care for him in our home and was by his side when he passed. This is how life and death should be. Losing the protections of FMLA would force us to have strangers care for our [loved] ones in their time of need.’”

Id. at 16–42.

Numerous employees commented that requesting and using FMLA leave was a positive experience because their employers were helpful and straightforward in providing such leave. Several of these employees commented that their employers initially suggested that they request FMLA leave and helped them through the process. *See, e.g.*, Employee Comments, Doc. 4734, at 1 (“My employer did not give me any difficulty in using my sick/personal time[.] * * * I spoke to my Human Resources person and she suggested I apply [for FMLA leave].”); Doc. 874, at 1 (an employee who needed leave to care for her mother in a different state “first heard of FMLA when I contacted my HR office about my dilemma, and I was so amazed and relieved that such a worker-centric law actually existed! With the help of FMLA, I was able to spend a month in Michigan helping my Mom—away from my job—without having to worry that I would be fired.”).

Other employees observed that their employers put them at ease when they requested FMLA leave. Specifically, an employee recalled when her child became ill with a brain tumor that her “company was very understanding about granting me [FMLA] leave. I felt very safe and secure knowing that I could take leave and still have my job when I returned.” An Employee Comment, Doc. 95, at 1. Similarly, an employee said she was “[s]o thankful when my employer informed me of this law because it gave my mom peace of mind knowing that I would be available for her when she needed me.” An Employee Comment, Doc. 4773, at 1.

Often employees were thankful because their employers were sympathetic to their family needs while on FMLA leave. The National Association of Working Women provided the example of “a 41-year-old single mother in Aurora, Colorado. The FMLA allows her to take off whenever her 11-year-old son * * * has an attack caused by his chronic asthma. ‘When he does get sick, I have to be up practically 24 hours,’ [the mother] says, praising her employer, Kaiser Permanente, and her supervisor for understanding her situation.” Doc. 10210A, at 1. One employee said her employer’s sympathy during FMLA leave prevented her from looking for new work: “Thanks to the FMLA, I was able to take three months off work with full salary in order to take care of [my husband] when he was reduced to a state of complete dependency. * * * I was secure in the knowledge that I could come right back to my job, and I developed a keen sense of loyalty to my employer which has

more than once prevented me from looking for work elsewhere.” An Employee Comment, Doc. R62, at 1. Finally, one employee stated she did not find requesting FMLA leave to be “cumbersome or unreasonable” because her Human Resources department was “very helpful with the entire process.” An Employee Comment, Doc. 4720, at 1. Further, she noted that “the process and leave itself [was a Godsend] as caring for our Mother was very, very stressful[.]” *Id.*

Many comments recounted employer policies that go above and beyond what is required under the Act. *See, e.g.*, An Employee Comment, Doc. 5069, at 1 (employer “gives paid medical leave based on how much time is medically necessary.”); Jill Ratner, President, The Rose Foundation for Communities and the Environment, Doc. 4877, at 1 (A non-profit foundation that provides “one week of paid family leave (in addition to two weeks of paid sick leave) to all employees” commented that “providing family leave is critical to recruiting and retaining qualified staff, and to maintaining staff morale and effectiveness.”); An Employee Comment, Doc. 1106, at 1 (“Altogether, I was away from work for about two months or so. My employer, Monsanto, was very generous with me. In addition to granting the time off and guaranteeing I would still have my job when I returned, they paid sick leave during this period.”); An Employee Comment, Doc. 70, at 1 (The employer of an employee who had been employed for less than one full year when she needed FMLA leave to care for her sick mother “essentially applied the FMLA rules anyway; they let me use all my vacation time and then gave me unpaid leave. I cannot tell you what a difference that made.”); National Employment Lawyers Association, Doc. 10265A, at 3 (An attorney association commented that one of her clients suffered from chronic fatigue syndrome, which shortened her work day by 1 to 2 hours, but “her employer was very cooperative with her efforts to continue working by allowing her to use her FMLA [leave] in these short blocks of time and wasn’t even really counting whether she was using up her FMLA leave.”).

A professor commented that her college provided leave periods in addition to FMLA leave, lasting the length of a full school term. An Employee Comment, Doc. R79A, at 1. “I also underwent surgery, several cycles of adjuvant chemotherapy, and a series of medical tests for the management of my cancer and am currently considered to be cancer-free and doing well. These treatments were possible, not only

because of my excellent medical coverage as a full-time university employee, but because I could take a one-term medical leave in the fall and still receive paychecks[.]” *Id.*

Some employers also noted that making it easier on employees to use FMLA leave was a positive experience from their perspective. One employer commented:

If I have an employee with a child or family member with a serious illness, and this employee is unable to be with that family member when needed, they are distracted at work and their productivity suffers. In contrast, if they are allowed time to take care of that family member, their productivity increases. They know what they have to accomplish and—sometimes by working at home, or working extra hours, or skipping lunch, or working exceptionally hard—they get it done. And in the end I have an extremely loyal employee.

Marie Alexander, President & CEO, Quova, Inc., Doc. 5291, at 1. A public sector employer commented that administering FMLA leave was “no more difficult to navigate than any other labor oriented legislation. In fact, I find it very straightforward, and it has been a literal lifesaver for some of our people.” Kevin Lowry, Nassau County Probation, Doc. 86, at 1. The commenter went on to say, “In the long run, most people will appreciate the extra protection offered by the employer during a difficult time and will return as more motivated employees once the crisis has passed.” *Id.* The benefit to employers of providing FMLA leave to employees was also the topic of another employer’s comment: “As a supervisor, FMLA allowed me to keep a good employee while she cared for her terminally ill husband. After he passed away, she came back to work and has continued to contribute to [the company] in an extremely valuable way.” Chris Yoder, Doc. 922, at 1.

Some employees also noted that, upon returning from FMLA leave, they felt more productive at work and more loyal to their employer. One employee said, “My mentor allowed me to use my own sick leave and vacation and then to hold my position without pay until after my mother passed and I was able to return to work. The course of my mother’s illness was quick, and I was gone about six weeks total. When I returned to work, I was able to re-engage in it and be productive.” An Employee Comment, Doc. 885, at 1. Another employee commented, “I used FMLA three times in the last 9 years (with and without pay); each time I was very grateful to know that my job status was protected when I was out on leave. All three times I returned to work and

rededicated myself to my job. FMLA helped me, my family, and my loyalty and productivity in the workplace." An Employee Comment, Doc. R2, at 1.

A telecommunications employee also commented that taking FMLA leave allows her to be more productive: "The FMLA has changed my life. It has saved my job. Without the intermittent leave, and my taking only 1.5 days maximum per month, I would be on a disability. When I do miss work, I work twice as hard to make up for the time I am gone. I actually produce more than those who don't take the FMLA time." An Employee Comment, Doc. 233, at 1. Another employee noted that FMLA leave is not "charity" but "instead it safeguard[s] loyal employees who, because of unforeseen circumstances need a temporary helping hand." An Employee Comment, Doc. 4732, at 1. Further, the commenter noted, "I have known a family which has benefited tremendously by the FMLA. After assistance, they have emerged once again into a productive, tax paying, exciting family that is contributing to our community." *Id.*

While other chapters of this Report detail areas where commenters indicate the FMLA may not work as well as it could, the comments in this chapter show the continued value to employees and employers of the FMLA leave entitlements. While employees were relieved at having available job-protected leave, they also often noted their increased loyalty to their employers after using periods of FMLA leave, especially where they felt their employers were sympathetic concerning the leave circumstances and helpful with the procedures for taking leave. Employers, as well as employees often noted increased productivity among employees returning from FMLA leave and, in some instances, provided greater benefits than those required by the Act. The value of FMLA leave was pointed out for all types of qualifying leave scenarios, but was particularly referenced in regard to employees of the "sandwich generation" who frequently find themselves caring for their own health needs, those of their children, and of their aging parents.

II. Ragsdale/Penalties

In *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002), the Supreme Court held that the penalty provision in the Department's regulation at section 825.700(a) is invalid. That regulation states that "[i]f an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." 29

CFR 825.700(a). The Court held the provision is invalid because, in some circumstances, it requires employers to provide leave in excess of an employee's 12-week statutory entitlement. Although the Court did not invalidate the underlying notice and designation provisions in the regulations, it made clear that any "categorical penalty" for a violation of such requirements would exceed the Department's statutory authority.

The Request for Information noted that a number of courts have invalidated a similar penalty provision found in section 825.110(d), which requires an employer to notify an employee prior to the employee commencing leave as to whether the employee is eligible for FMLA leave. If the employer fails to provide the employee with such information, or if the information is not accurate, the regulation bars the employer from challenging the employee's eligibility at a later date, even if the employee is not eligible for FMLA leave pursuant to the statutory requirements.

Therefore, the Department asked commenters what "changes could be made to the regulations in order to comply with *Ragsdale* and yet assure that employers maintain proper records and promptly and appropriately designate leave as FMLA leave?" The Department received a significant number of comments regarding this issue and related notice issues.

A. Background

The FMLA entitles eligible employees of covered employers to 12 weeks of leave per year for certain family and medical reasons. 29 U.S.C. 2612(a)(1). In order to allow employees to know when they are using their FMLA-protected leave, the regulations state that "it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee." 29 CFR 825.208(a). More specifically, "[o]nce the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave." 29 CFR 825.208(b)(1). See also 29 CFR 825.301(b)(1)(i) and (c). The employer's designation may be oral or in writing, but if it is oral, it must be confirmed in writing, generally no later than the following payday, such as by a notation on the employee's pay stub. 29 CFR 825.208(b)(2).

The categorical penalty provision of the regulations with regard to paid leave provides as follows:

If the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employee either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with paragraph (b)), the employer may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the Act, but none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement.

29 CFR 825.208(c). See also 29 CFR 825.700(a) ("If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement.").

In *Ragsdale*, 535 U.S. 81, the Supreme Court considered a case in which the plaintiff had received 30 weeks of leave from her employer. At that point, her employer denied her request for additional leave and terminated her employment. She alleged that her employer violated section 825.208(a), which requires an employer to designate prospectively that leave is FMLA-covered and to notify the employee of the designation. Because her employer did not do so, she alleged that she was entitled under section 825.700(a) to an additional 12 weeks of FMLA-protected leave.

The Court found that this "categorical penalty" is "incompatible with the FMLA's comprehensive remedial mechanism," which puts the burden on the employee to show that the employer interfered with, restrained, or denied the employee's exercise of FMLA rights, and that the employee suffered actual prejudice as a result of the violation. *Ragsdale*, 535 U.S. at 89. The Court observed that, according to the regulation, the "fact that the employee would have acted in the same manner if notice had been given is, in the Secretary's view, irrelevant." *Id.* at 88. The Court also found that the regulation "subverts the careful balance" that Congress developed with regard to "the FMLA's most fundamental substantive guarantee" of an entitlement to a total of 12 weeks of leave, which was a compromise between employers who wanted fewer weeks and employees who wanted more. *Id.* at 93-94. Thus, the Court held that the penalty provision of section 825.700(a) is "contrary to the Act and beyond the Secretary of Labor's authority." *Id.* at 84.

The Supreme Court did not invalidate the notice and designation provisions in the regulations. Indeed, the Court recognized that there may be situations where an employee is able to show that the employer's failure to provide the required notice of FMLA rights prejudiced the employee in a specific way (such as depriving the employee of an opportunity to take intermittent leave or to return to work sooner). The Court stated, however, that the Act's remedial structure requires a "retrospective, case-by-case examination" to determine "whether damages and equitable relief are appropriate under the FMLA," based upon the steps the employee would have taken had the employer given the required notice, rather than a categorical penalty. *Id.* at 91. See *Sorrell v. Rinker Materials Corp.*, 395 F.3d 332, 336 (6th Cir. 2005) (remanding the case for a determination of whether the doctrine of estoppel bars the company from challenging the employee's entitlement to FMLA leave because the employer had unconditionally approved the leave request); *Duty v. Norton-Alcoa Proppants*, 293 F.3d 481, 493–94 (8th Cir. 2002) (holding that the employer was equitably estopped from asserting that the plaintiff had exhausted his 12 weeks of FMLA leave, based on a letter expressly informing him after 22 weeks of disability leave that he still had 12 weeks of FMLA leave left); *Wilkerson v. Autozone, Inc.*, 152 Fed. Appx. 444 (6th Cir. 2005) (based on the employer's statement that the employee had six weeks of post-partum FMLA leave, equitable estoppel applied because the employee reasonably relied on it and showed the requisite prejudice).

The *Ragsdale* decision addressed only the penalty provision in section 825.700(a), which is applicable to both unpaid leave and paid leave (*Ragsdale* involved unpaid leave). The penalty provision in section 825.208(c) (applicable only to paid leave) is virtually identical. A number of courts have held that the rationale of the *Ragsdale* decision applies equally to section 825.208(c), and that an employee must show prejudice from the lack of notice to establish a violation of the Act. See, e.g., *Miller v. Personal-Touch of Va., Inc.*, 342 F. Supp. 2d 499, 513–14 (E.D. Va. 2004); *Donahoo v. Master Data Ctr.*, 282 F. Supp. 2d 540, 554–55 (E.D. Mich. 2003); and *Phillips v. Leroy-Somer N. Am.*, No. 01–1046–T, 2003 WL 1790941, *5–7 (W.D. Tenn. Mar. 28, 2003).

As discussed above, a number of courts also have found that the "deeming" provision in section 825.110(d) of the regulations is invalid and contrary to the statute. The FMLA

establishes that employees are eligible for FMLA leave only if they have been employed by the employer "for at least 12 months" and have "at least 1,250 hours of service with such employer during the previous 12-month period." 29 U.S.C. 2611(2)(A). The regulations generally require an employer to notify an employee whether the employee is eligible for FMLA leave prior to the employee commencing leave. If the employer confirms the employee's eligibility, "the employer may not subsequently challenge the employee's eligibility." 29 CFR 825.110(d). Furthermore, "[i]f the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible. The employer may not, then, deny the leave. Where the employee does not give notice of the need for leave more than two business days prior to commencing leave, the employee will be deemed to be eligible if the employer fails to advise the employee that the employee is not eligible within two business days of receiving the employee's notice." *Id.*

Thus, even if an employee fails to satisfy the statutory eligibility requirements, the regulation "deems" the employee to be eligible for FMLA-protected leave. The courts have held that this regulation is invalid. See, e.g., *Woodford v. Comty. Action of Greene County, Inc.*, 268 F.3d 51, 57 (2d Cir. 2001) ("The regulation exceeds agency rulemaking powers by making eligible under the FMLA employees who do not meet the statute's clear eligibility requirements."); *Brungart v. BellSouth Telecomm., Inc.*, 231 F.3d 791, 796–97 (11th Cir. 2000), cert. denied, 532 U.S. 1037 (2001) ("There is no ambiguity in the statute concerning eligibility for family medical leave, no gap to be filled."); *Dormeyer v. Comerica Bank-Ill.*, 223 F.3d 579, 582 (7th Cir. 2000) ("The statutory text is perfectly clear and covers the issue. The right of family leave is conferred only on employees who have worked at least 1,250 hours in the previous 12 months." Therefore, the Department "has no authority to change the Act," as the regulation attempts to do, by making ineligible employees eligible for family leave).

The courts have concluded that an employee may pursue a case, based on the principle of equitable estoppel, where the employer's failure to advise the employee properly of his/her FMLA eligibility/ineligibility is determined to have interfered with the employee's rights, and the employee could have taken other action had s/he been properly notified. See, e.g., *Dormeyer*, 223 F.3d at 582 ("an employer who by

his silence misled an employee concerning the employee's entitlement to family leave might, if the employee reasonably relied and was harmed as a result, be estopped to plead the defense of ineligibility to the employee's claim of entitlement to family leave."); *Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 722–27 (2d Cir. 2001). See also Wage and Hour Opinion Letter FMLA2002–1 (Aug. 6, 2002).

B. Comments on *Ragsdale*: Notice and Designation Issues

A number of commenters addressed the *Ragsdale* categorical penalty issue and responded to the Request for Information's question regarding what "changes could be made to the regulations in order to comply with *Ragsdale* and yet assure that employers maintain proper records and promptly and appropriately designate leave as FMLA leave?"

The National Coalition to Protect Family Leave stated that section 825.700(a) and the similar penalty provision in section 825.208 should be removed from the regulations, and that "any 'penalty' that DOL wants to impose on employers for failure to follow certain notice obligations dictated by the regulations must be tailored to the specific harm suffered by the employee for failure to receive notice." National Coalition to Protect Family Leave, Doc. 10172A, at 43. The Coalition asserted that retroactive designation should be permitted, so that employees "could receive the FMLA protections despite their failure to adequately communicate that the FMLA is at issue, and employers who inadvertently fail to timely designate leave can have the opportunity to count the absence toward the employee's FMLA leave bank. Retroactive designation should be permitted in all cases where the employee is eligible, the condition qualifies, and the employee has adhered to his/her FMLA notice obligations that FMLA leave is at issue." *Id.* at 44. See also Proskauer Rose LLP, Doc. 10182A, at 9 (the regulations should allow an employer "who initially fails to designate a leave as FMLA leave, but nevertheless grants the employee the leave, to retroactively designate the leave as FMLA leave"); Coolidge Wall Co. LPA, Doc. 5168, at 1 (the regulations should state that an employer that has an FMLA policy in its handbook, for which an employee has acknowledged receipt, can send out the FMLA notice "mid-leave and can retroactively count the employee's time"); Commonwealth of Pennsylvania, Doc. FL95, at 2–3 (retroactive

designation should be allowed “when an employee’s FMLA rights were provided during the period of absence,” because the two-day verbal notification requirement is difficult to achieve, although the written notification/designation requirements “usually can occur * * * within the timeframes prescribed by the Regulations”).

The Air Transport Association of American, Inc., and the Airline Industrial Relations Conference suggested that the regulations be revised in light of *Ragsdale*, because employers do not know which regulations they must follow and which are no longer valid, and employees who read them also are confused about which regulations their employers must follow. Doc. FL29, at 15. See also Association of Corporate Counsel, Doc. FL31, at 10 (section 825.700 should be deleted to clarify that an employer’s failure to timely designate leave does not increase the statutory leave period).

United Parcel Service, Doc. 10276A, at 2, suggested that the Department should clarify in section 825.208 the effect of an employer’s mistaken designation of FMLA leave, because some courts have held that the doctrine of equitable estoppel prevents an employer from denying protected leave based on a subsequent determination that the employee was not eligible. The United States Postal Service similarly suggested that both sections 825.700(a) and 825.208(c) should be revised to clarify that “a technical violation of the notice provisions does not result in a windfall of surplus FMLA protection for an employee who suffered no harm as a result.” Doc. 10184A, at 4. A large provider of human resources outsourcing services commented that “by deleting the ‘penalty’ provision and simply reinforcing employer notification obligations,” the Department would appropriately respond to *Ragsdale*. Hewitt Associates, Doc. 10135A, at 8. Hewitt stated that employers benefit by providing more notice because they: Educate employees about their rights, responsibilities, and benefits; maximize the likelihood that employees will return to work promptly; maintain or enhance their engagement; minimize the impact on other HR administrative processes; minimize the impact on business operations; and reduce available time off balances accurately. *Id.* at 7–8.

Finally, as discussed in detail in Chapter V, a number of commenters stated that the two-day time frame for designating leave is inadequate, or that the designation requirement should apply only when employees expressly request FMLA leave. The National

Association of Convenience Stores suggested that, in light of *Ragsdale*, “DOL should consider eradicating all formal employer designation requirements.” Doc. 10256A, at 7.

Other stakeholders, however, presented views in support of the current notice and designation requirements and had suggestions for changes that would provide improved and prompt information to employees. One commenter stated that the data show that two days is sufficient to allow employers to review and respond to employees’ leave requests. “Most organizations spend only between thirty and 120 minutes of administrative time per FMLA leave episode to provide notice, determine eligibility, request and review documentation, and request a second opinion. Therefore, no change to the current two-day response requirement is warranted.” National Partnership for Women & Families, Doc. 10204A, at 21 (citation omitted). That commenter also noted that while the Supreme Court struck down the “categorical penalty” in the current regulations, it left intact the requirement that employers designate leave, and it “did not prohibit DOL from imposing any penalties on employers for failing to properly designate and notify employee about leave.” *Id.* at 18. Therefore, in light of the overall purposes of the notice and designation requirements, this commenter suggested that any changes to the regulations should:

- “Emphasize that the Court did not alter the obligation of employers to both designate leave promptly and notify employees of how that leave has been designated. Thus, employers must continue to adhere to these designation and notice requirements or risk penalties.”
- “Reaffirm and modify current recordkeeping requirements that require employers to keep accurate and complete records of how leave has been designated, and when the employee was notified of the designation.”
- “Prohibit employers from making any retroactive changes to how leave has been designated without notification and consultation with the employee, and require maintenance of records documenting such notification and consultation.”
- “Establish new penalties for employer non-compliance that are not automatic, but can be imposed following a complaint by the affected employee and an independent determination of the harm caused by the employer’s violation.” *Id.* at 18–19. See also Letter from 53 Democratic Members of Congress, Doc.

FL184, at 2 (noting that *Ragsdale* invalidated only the penalty provision of the regulations and that any changes in the regulations should be limited to remedying that problem and should go no further).

Another commenter suggested that “fines should be imposed” on employers that do not maintain accurate records, and they “should not be able to retroactively change how leave was originally designated without notice and consultation with the employee.” OWL, The Voice of Midlife and Older Women, Doc. FL180, at 2.

A number of commenters emphasized the hardships employees suffer when they do not know promptly whether the employer believes they are entitled to protected leave. Employees then either feel compelled not to take the time off that they need, or else they take off but are afraid because they do not know whether they will be subject to discipline for being off work. See, e.g., Frasier, Frasier & Hickman, LLP, Doc. FL60, at 1–3. As discussed in detail in Chapter V, a number of commenters therefore suggested that employers be required to inform employees promptly when they are using FMLA leave.

Another commenter noted that his employer “is able to delay, and many times deny, for many weeks and months the benefits and protections which the Act affords,” because it repeatedly asks for more information on the certification form. An Employee Comment, Doc. 10094A, at 2. During this “very lengthy approval process, the employee is subjected to attendance-related discipline when the absence should have been approved or at the very least be treated as ‘pending.’” *Id.* See also An Employee Comment, Doc. 5335, at 1 (noting that she had gone out on short-term disability leave for surgery but, despite her regular contact with the benefits specialist, she was not notified that the company had placed her on FMLA leave). This issue is addressed in more detail in Chapter VI relating to medical certifications.

C. Deeming Eligible Issues

A number of commenters also addressed issues related to the provision in 29 CFR 825.110(d) deeming employees eligible for FMLA leave if an employer either fails to advise them of their eligibility status within the allotted time period, or incorrectly advises them that they are eligible when they have not satisfied the statutory requirements of 12 months of employment and 1,250 hours of service in the preceding 12 months.

One commenter stated that “[t]he Supreme Court’s decision in the

Ragsdale case casts grave doubt on the validity of other categorical penalties in the Regulations.” National Coalition to Protect Family Leave, Doc. 10172A, at 13. It noted that a number of courts have struck down both the provision in section 825.110(d) stating that an employer may not later challenge an employee’s eligibility if it mistakenly confirms that an employee is entitled to leave, and the provision deeming an employee eligible if the employer fails to notify the employee that the employee is not eligible prior to the start of leave (if the employer had advance notice) or within two business days of receiving notice. This commenter stated that it “urges DOL to delete the language in section 825.110(d) that [the] federal courts have invalidated.” *Id.* at 14.

Another commenter stated that, in light of the *Ragsdale* decision, the penalty provision for an employer’s failure to timely notify employees that they are eligible for FMLA leave should be deleted; however, the regulation should continue to require that the employer notify employees whether they are/are not eligible, but either delete the consequences from the regulation or incorporate the interference/estoppel theory approved by the Supreme Court in *Ragsdale*. “That is, if the employee can demonstrate that the failure to provide notice caused actual harm to the employee’s FMLA rights the employer’s notice failure is actionable interference.” Carl C. Bosland, Esq., Preemptive Workforce Solutions, Inc., Doc. 5160, at 2–3.

Another commenter suggested that, if an employer has a handbook, bulletin board, orientation materials, etc., that show employees were provided information about the FMLA, which leaves are protected, and how to apply for protected leave, “the employer should be exempted from consequences under this part of the act.” Ken Lawrence, Doc. 5228, at 1.

Hewitt Associates noted that while equitable estoppel provides some guidance, it does not provide a rule. “In fact, an employer that wishes to ‘undeem’ a leave is now required to make a subjective review of the employee’s circumstances (if the employer knows them) and analyze whether it would be fair to revoke the designation. * * * [R]evoking § 825.110(d) allows employers to correct their errors by undesignating these leaves but, considering the analysis required, at an overly burdensome administrative price. The Department should craft a bright-line rule that balances the right of employers to revoke an ‘inappropriate’ FMLA

designation, with fairness to employees who have relied upon that designation.” Hewitt Associates, Doc. 10135A, at 10. This commenter suggested a rule that both allows employers to count the time that an ineligible employee is permitted to remain on leave against that employee’s eventual 12-week entitlement, and gives employees a “grace period” to return to work (the length of which would turn on circumstances such as the length of time left in the leave, the reason for the leave, travel, etc.). The commenter also would require the employer to provide an “immediate and thorough notification to the employee” explaining that the employee was not eligible for leave, how the absences would be treated, the length of the grace period, etc. *Id.* at 11.

As discussed in detail in Chapter V, a substantial number of employers emphasized the difficult and time-consuming nature of making eligibility determinations, with regard to calculating both the number of hours worked in the past 12 months and the amount of FMLA leave used. They objected to any revision to the regulations that would require employers to provide periodic reports to employees about the amount of FMLA leave they have remaining. *See, e.g.*, United Parcel Service, Doc. 10276A, at 7–8. On the other hand, a few employers noted that they use payroll tracking systems that tell them whether employees are eligible for FMLA leave.

Other commenters emphasized the importance to employees of knowing promptly whether they are eligible for leave, and they suggested that the FMLA regulations should encourage employers to provide accurate, thorough and timely information about FMLA eligibility and procedures. As discussed in Chapter V, these commenters emphasized that many employees still do not know whether they are protected by the FMLA; they do not have information about their leave options; and they do not know whether their leave is being designated as FMLA leave. Therefore, a number of commenters suggested that the Department should consider regulations that require employers to provide notice to employees, when they have worked for one year and on an annual basis, explaining their eligibility status, their leave entitlement, and the procedures for applying for FMLA leave. *See, e.g.*, American Federation of Labor and Congress of Industrial Organizations, Doc. R329A, at 40.

III. Serious Health Condition

The Department asked two questions in its Request for Information about the

definitions of serious health condition contained at 29 CFR 825.114: (1) “Section 825.114(c) states ‘[o]rordinarily, unless complications arise, the common cold, the flu, earaches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave.’ Have [the] limitations in section 825.114(c) been rendered inoperative by the regulatory tests set forth in section 825.114(a)?”; and (2) “Is there a way to maintain the substantive standards of section 825.114(a) while still giving meaning to section 825.114(c) and congressional intent that minor illnesses like colds, earaches, etc., not be covered by the FMLA?”

The regulatory definition of serious health condition is central to the FMLA because the primary reason that people take FMLA leave is to attend to their own or a family member’s health needs. *See Westat*, “Balancing the Needs of Families and Employers, Family and Medical Leave Surveys, 2000 Update,” January 2001, at 2–5 (hereinafter “2000 Westat Report”) (83.3% of employees report “own health” or health of parent, child, or spouse as reason for taking leave); *see also* National Coalition to Protect Family Leave, Doc. 10172A, Darby Associates, Attachment at 10 (“The [employee’s] own health * * * was the predominant reason for leave[.]”).³ The Department received an overwhelming response to these questions. In order to fully understand these comments, though, and to give them some context it is necessary to explain the regulatory history of the definition of serious health condition.

A. History and Background

1. The Family and Medical Leave Act of 1993

Under the Act, an employee may be entitled to FMLA leave for any one of the four following reasons:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the

³ Westat is a statistical survey research organization serving agencies of the U.S. Government, as well as businesses, foundations, and state and local governments. These surveys were commissioned by the Department of labor in 2000 as an update to similar 1995 surveys ordered by the Commission on Family and Medical Leave, which was established by the FMLA.

employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee. 29 U.S.C. § 2612(a)(1). The Act defines a serious health condition as “an illness, injury, impairment, or physical or mental condition that involves—(A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider.” 29 U.S.C. 2611(11). The term “continuing treatment” is not defined by the statute. The FMLA expressly grants to the Secretary of Labor the authority to “prescribe such regulations as are necessary to carry out [the Act].” 29 U.S.C. 2654.

The legislative history of the Act states that “[w]ith respect to an employee, the term ‘serious health condition’ is intended to cover conditions or illnesses that affect an employee’s health to the extent that he or she must be absent from work on a recurring basis or for more than a few days for treatment or recovery.” H. Rep. No. 103–8, at 40 (1991); S. Rep. No. 103–3, at 28 (1993). The scope of coverage intended by “serious health condition” is not unlimited, however:

The term ‘serious health condition’ is not intended to cover short-term conditions for which treatment and recovery are very brief. It is expected that such conditions will fall within even the most modest sick leave policies. Conditions or medical procedures that would not normally be covered by the legislation include minor illnesses which last only a few days and surgical procedures which typically do not involve hospitalization and require only a brief recovery period. * * * It is intended that in any case where there is doubt whether coverage is provided by this act, the general tests set forth in this paragraph shall be determinative.

Id. The House and Senate Committee Reports also list the types of illnesses and conditions that would likely qualify as serious health conditions:

Examples * * * include but are not limited to heart attacks, heart conditions requiring heart bypass or valve operations, most cancers, back conditions requiring extensive therapy or surgical procedures, strokes, severe respiratory conditions, spinal injuries, appendicitis, pneumonia, emphysema, severe arthritis, severe nervous disorders, injuries caused by serious accidents on or off the job, ongoing pregnancy, miscarriages, complications or illnesses related to pregnancy, such as severe morning sickness, the need for prenatal care, childbirth and recovery from childbirth.

H. Rep. No. 103–8, at 40 (1991); S. Rep. No. 103–3, at 29 (1993). The committee reports state, “All of these conditions

meet the general test that either the underlying health condition or the treatment for it requires that the employee be absent from work on a recurring basis or for more than a few days for treatment or recovery.” *Id.* The reports further explained that these covered conditions either involve inpatient care or significant continuing treatment. *See id.* (“For example, someone who suffers a heart attack generally requires both inpatient care at a hospital and ongoing medical supervision after being released from the hospital. * * * Someone who has suffered a serious industrial accident may require lengthy treatment in a hospital and periodic physical therapy under medical supervision thereafter.”).

Significantly, the committee reports characterize covered FMLA conditions as ones that are not only serious but also cause the employee to be absent from work: “With respect to an employee, the term ‘serious health condition’ is intended to cover conditions or illnesses that affect an employee’s health to the extent that he or she must be absent from work[.]” H. Rep. No. 103–8, at 40; S. Rep. No. 103–3, at 28. “All of these health conditions require absences from work[.]” H. Rep. No. 103–8, at 41; S. Rep. No. 103–3, at 29.

2. Department of Labor Regulations (1993–1995)

The Act, including the definition of serious health condition described above, was enacted on February 5, 1993. Congress gave the Department 120 days to promulgate regulations under the new statute. *See* 29 U.S.C. 2654.

Pursuant to the Act, the Department promulgated interim regulations on June 4, 1993, which became effective August 5, 1993 (the effective date of the Act). The Department then received public comments on the regulations and used the comments to further refine the regulations. Final regulations were issued on January 6, 1995. These final regulations, adopted pursuant to this notice-and-comment rulemaking, established the comprehensive framework that exists today for determining a serious health condition.

The final rulemaking yielded six separate definitions of serious health condition that exist today. A statutory definition of serious health condition that involved only two parts (inpatient care or continuing treatment) has thus been expanded to six separate and distinct regulatory tests for determining a serious health condition. Giving meaning to the broad and undefined statutory term “continuing treatment” presented a daunting task for the Department. Moreover, the Department

had to be careful to ensure the definition covered every type of serious health condition that Congress intended to cover while not extending the Act’s protections to those conditions Congress intended to exclude.

The first regulatory definition in the regulations is a stand-alone definition from the statute—“inpatient care (i.e., an overnight stay) in a hospital.” This is followed by five separate definitions for “continuing treatment,” all of which also qualify as serious health conditions. *See* 29 CFR § 825.114(a)(1)–(2). One of these five definitions is “incapacity due to pregnancy,” which is a discrete definition clearly articulated in the legislative history (“ongoing pregnancy, miscarriages, complications or illnesses related to pregnancy, * * * the need for prenatal care, childbirth, and recovery from childbirth.”).

Of the four remaining definitions of serious health condition, stakeholders have focused significantly on one definition:⁴

(i) A period of incapacity of more than three consecutive calendar days * * * that also involves:

(A) Treatment two or more times by a health care provider * * * or

(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

29 CFR 825.114(a)(2)(i)(A)–(B). This is an objective definition of continuing treatment the Department established based in part on state workers’ compensation laws and the Federal Employees’ Compensation Act (“FECA”), which apply a three-day waiting period before compensation is paid to an employee for a temporary disability. *See* 60 FR 2180, 2192 (Jan. 6, 1995). “A similar provision [to FECA] was included in the FMLA rules; a period of incapacity of ‘more than three days’ was used as a ‘bright line’ test based on references in the legislative history to serious health conditions lasting ‘more than a few days.’” 60 FR at 2192.

This objective test changed little during the rulemaking process despite the numerous proposed revisions submitted to the Department. These comments received in response to the interim regulations represented a multitude of permissible alternative directions the Department might have gone with this test, but were rejected as the Department adhered to its original

⁴ Stakeholders did also comment significantly on the definition of a “chronic” serious health condition contained at 29 CFR 825.114(a)(2)(iii), which is discussed in Chapter IV.

standard, which is reflected in the current regulations stated above. It is worth examining what some of those comments were to the original rulemaking record to better inform the comments received to the current RFI.

First, several parties contended that the period of incapacity—whatever the exact length of days—should be judged by “absence from work” as opposed to calendar days. 60 FR at 2192. Some stakeholders to the rulemaking noted that the Department’s proposed “calendar day” rule contradicted the legislative intent (reflected in the committee reports) that “the employee must be absent from work for the required number of days[.]” *Id.* at 2192. Another commenter noted that under the three-calendar-day rule, employers would have no way of verifying incapacity because a single absence on a Friday followed by a weekend of incapacity could qualify as a serious health condition. *See id.* Other commenters similarly favored the workday schedule because it was more compatible with other sick leave and short-term disability programs and “removes any doubt as to whether an employee was otherwise incapacitated and unable to work during days the employee was not scheduled to work.” *Id.* The Department originally chose “calendar days” in the interim regulations. After receiving comments, the Department chose, for two policy reasons, to retain calendar days as opposed to work days: “The Department has * * * concluded that it is not appropriate to change the standard to working days rather than calendar days because the severity of the illness is better captured by its duration rather than the length of time necessary to be absent from work.” *Id.* at 2195. The Department further explained: “[A] working days standard would be difficult to apply to serious health conditions of family members or to part-time workers [who might be incapacitated but not necessarily absent from work].” *Id.*

Second, there was also a broad range of suggestions as to what length or type of incapacity was appropriate for defining a serious health condition. Some comments rejected any fixed day limitation at all, stating that a minimum durational limit had been specifically rejected during a committee markup of the bill. *See id.* at 2192. Still others suggested that three days was “unreasonably low and trivialized the concept of seriousness[.]” *Id.* “Fifteen commenters suggested extending the three-day absence period to 5, 6, 7, or 10 days[.] * * * two weeks[.] * * * or 31 days[.]” *Id.* Other commenters

suggested eschewing a strict day standard in favor of adopting each individual state’s waiting period for workers compensation benefits or, alternatively, the EEOC’s definition of disability. *See id.* at 2193. The Department rejected these various proposals in favor of its original standard: “Upon review, the Department has concluded that the ‘more than three days’ test continues to be appropriate. The legislative history specifically provides that conditions lasting only a few days were not intended to be included as serious health conditions, because such conditions are normally covered by employers’ sick leave plans.” *Id.* at 2195.

The Department did make one change of note in the definition of serious health condition, however. After the 1993 interim regulations were promulgated, several commenters urged “clarifications [that would] exclude from the definition [of serious health condition] minor, short-term, remedial or self-limiting conditions, and normal childhood or adult diseases (e.g., colds flu, ear infections, strep throat, bronchitis, upper respiratory infections, sinusitis, rhinitis, allergies, muscle strains, measles, even broken bones).” 60 FR at 2193. Still others suggested that the Department expressly list every ailment that would qualify as a serious health condition. *See id.* While the Department declined to provide a “laundry list of serious health conditions,” 60 FR at 2195, we did enumerate in the final regulations examples of ailments that customarily would not be covered by the Act: “Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave.” 29 CFR § 825.114(c). This language would become the subject of much reported confusion in the regulated community (reflected in, among other things, the many comments on this subject submitted in response to the RFI).

3. Wage and Hour Opinion Letters

In 1995, shortly after the regulations became final, the Department provided its initial interpretation of the serious health condition objective test when responding to an employer’s objections that the definition in sections 825.114(a)(2)(i)(A)–(B) did not reflect the intent of the Act’s authors. The Department’s response reflects an

ongoing struggle to reconcile this objective test in the regulatory definition (more than three calendar days of incapacity plus treatment) with the legislative intent also reflected in the regulations that common conditions like colds and flus not be covered by the Act.

The Department’s opinion letter response in 1995 stated that a minor illness such as the common cold could not be a serious health condition because colds were on the regulatory list of non-covered ailments. “The fact that an employee is incapacitated for more than three days, has been treated by a health care provider on at least one occasion which has resulted in a regimen of continuing treatment prescribed by the health care provider does not convert minor illnesses such as the common cold into serious health conditions in the ordinary case (absent complications).” Wage and Hour Opinion Letter FMLA–57 (Apr. 7, 1995). More than a year and a half later, however, the Department reversed course, stating that Wage and Hour Opinion Letter FMLA–57 “expresses an incorrect view, being inconsistent with the Department’s established interpretation of qualifying ‘serious health conditions’ under the FMLA regulations[.]” Wage and Hour Opinion Letter FMLA–86 (Dec. 12, 1996). In the second letter, the Department stated that such minor illnesses ordinarily would not be expected to last more than three days, but if they did meet the regulatory criteria for a serious health condition under section 825.114(a), they would qualify for FMLA leave. Complications, per se, need not be present to qualify as a serious health condition if the objective regulatory tests of a period of incapacity of “more than three consecutive calendar days” and a “regimen of continuing treatment by a health care provider” are otherwise met. *See id.* In reversing its position in this second opinion letter, the Department explained that the regulations reflect the view that, ordinarily, conditions like the common cold and flu would not routinely be expected to meet the regulatory tests. But such conditions could qualify under FMLA where the objective tests are, in fact, met in particular cases. *See id.* “For example, if an individual with the flu is incapacitated for more than three consecutive calendar days and receives continuing treatment, e.g., a visit to a health care provider followed by a regimen of care such as prescription drugs like antibiotics, the individual has a qualifying ‘serious health condition’ for purposes of FMLA.” *Id.*

4. United States Court of Appeals Decisions

Employers challenged the Department's objective regulatory definition of serious health condition in two U.S. Courts of Appeals. In both cases, the regulatory test was upheld as a permissible legislative rule pursuant to a congressional delegation of authority under the Act. See *Thorson v. Gemini, Inc.*, 205 F.3d 370 (8th Cir. 2000); *Miller v. AT&T Corp.*, 250 F.3d 820 (4th Cir. 2001). The Eighth Circuit in *Thorson* found the statutory term "serious health condition" was not precisely defined in the statute and legislative history: "[W]e do not see th[e] legislative history as Congress speaking 'directly' to the question of what constitutes a 'serious health condition.'" *Id.* at 381. Thus, the court deferred to the Department's reasonable legislative rule implementing the statute: "DOL's objective test for 'serious health condition,' which avoids the need for employers—and ultimately courts—to make subjective decisions about statutory 'serious health conditions,' is a permissible construction of the statute." *Id.* The Court acknowledged that this test might result in findings of serious health conditions for "minor illnesses" that Congress did not intend to cover, but that "the DOL reasonably decided that such would be a legitimate trade-off for having a definition of 'serious health condition' that sets out an objective test that all employers can apply uniformly." *Id.*

The Fourth Circuit even more squarely and directly upheld the objective test in the regulations because the plaintiff in that case was suffering from the flu—an illness listed in the regulations at 825.114(c) (reflecting legislative history) as an example of an illness that is generally not a serious health condition. The Fourth Circuit directly confronted the tension between the objective test and the list of ailments:

There is unquestionably some tension between subsection (a), setting forth objective criteria for determining whether a serious health condition exists, and subsection (c), which states that certain enumerated conditions "ordinarily" are not serious health conditions. Indeed, that tension is evidenced by Miller's illness. Miller was incapacitated for more than three consecutive calendar days and received treatment two or more times; thus, she satisfied the regulatory definition of a serious health condition under subsection (a). But, the condition from which Miller suffered—the flu—is one of those listed as being "ordinarily" not subject to coverage under the FMLA.

Id. at 831. The Court concluded—even without deferring to the second Wage

and Hour opinion letter—that "§ 825.114(c) is properly interpreted as indicating merely that common ailments such as the flu will not qualify for FMLA leave because they generally will not satisfy the regulatory criteria for a serious health condition." *Id.* at 832. However, "[s]ection 825.114(c) simply does not automatically exclude the flu from coverage under the FMLA. Rather, the provision is best read as clarifying that some common illnesses will not ordinarily meet the regulatory criteria and thus will not be covered under the FMLA." *Id.*

Having concluded the objective test was the dispositive one, the *Miller* court, like the *Thorson* court, upheld the regulatory definition as consistent with legislative intent. The court noted that these regulations were promulgated pursuant to an express delegation from Congress and should be given controlling effect "unless arbitrary, capricious, or manifestly contrary to statute." *Id.* at 833 (quotations omitted). The court stated that "when a regulatory choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or the legislative history that the accommodation is not one that Congress would have sanctioned." *Id.* (quotations omitted). The court held that the Department clearly was within its statutory purview in this case, stating: "Consistent with the statutory language, the regulations promulgated by the Secretary of Labor establish a definition of 'serious health condition' that focuses on the effect of an illness on the employee and the extent of necessary treatment rather than on the particular diagnosis. This policy decision is neither unreasonable nor manifestly inconsistent with Congress' intent to cover illnesses that 'require[] that the employee be absent from work on a recurring basis or for more than a few days for treatment or recovery' and involve 'continuing treatment or supervision by a health care provider.'" 250 F.3d at 835 (citations omitted). Finally, like the Eighth circuit, the Fourth Circuit noted:

It is possible that the definition adopted by the Secretary will, in some cases—and perhaps even in this one—provide FMLA coverage to illnesses Congress never envisioned would be protected. We cannot say, however, that the regulations adopted by the Secretary are so manifestly contrary to congressional intent as to be considered arbitrary.

Id.

B. Request for Information Comments and Recommendations

The responses to the RFI demonstrate that the definition of serious health condition continues to be a source of concern in the regulated community in terms of its scope and its meaning. While the Department asked only two narrow questions about the objective test and the list of ailments, commenters to the Request for Information voiced a wide array of opinions about the regulatory test in general.

A common theme the Department heard from various parties was that the regulatory definition of serious health condition is vague and/or confusing. The American Academy of Family Physicians stated: "The definition of a serious health condition within the Act creates confusion not only for the administrators of the program and employers but also for physicians. Requiring a physician to certify that a gastrointestinal virus or upper respiratory infection is a serious health condition in an otherwise healthy individual is incongruous with medical training and experience. * * * [Moreover, t]he categories of 'Serious Health Conditions' are overly complicated and * * * contradictory." Doc. FL25, at 1. The American College of Occupational and Environmental Medicine agreed: "The term 'serious health condition' is unnecessarily vague. Employees, employers and medical providers would be well served if the FMLA were to more clearly define the criteria for considering a health condition serious." Doc. 10109A, at 2. Other commenters echoed this same concern: "Uniformly, employers have found the definition of 'serious health condition' and the criteria for determining whether or not an employee has a 'serious health condition' to be extremely broad and very confusing." ORC Worldwide, Doc. 10138A, at 2. "This [serious health condition] definition is widely considered to be vague and overly broad, and has caused unnecessary confusion." Florida Power & Light Company, Doc. 10275A, at 2. "What constitutes a serious health condition? The definition is not clear." City of Philadelphia, Doc. 10058A, at 1. "The current definition is so vague that it is nearly impossible to define a condition that does not qualify as a serious medical condition." Northern Kentucky Chamber of Commerce, Doc. 10048A, at 2.

Commenters often pointed to the language in section 825.114(c) regarding minor ailments as the primary source of definitional confusion. Whereas the first

part of the regulatory definition of serious health condition in subparagraph (a)(2) provides objective standards for leave (irrespective of the person's medical diagnosis) in terms of "days" and "incapacity" and "health care provider" visits, this language in subparagraph (c) suggests the opposite: excluding common illnesses by diagnosis/name without regard to seriousness. The American Bakers Association stated: "[The definition of serious health condition] has also caused unnecessary confusion for employers who rely on regulatory language that states, 'Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease etc. are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave.' 29 CFR 825.114(c)." American Bakers Association, Doc. R354A, at 4. The Association of Corporate Counsel made a similar point: "[T]he Department should clarify its guidance in section [825.114](c) on when conditions such as the common cold, the flu, earaches, upset stomach, minor ulcers, headaches, and routine dental or orthodontia problems could be considered as serious health conditions. The current regulation indicates that such conditions should not normally be considered serious health conditions." Doc. FL31, at 14.

Overall, it is probably fair to characterize the comments from employer groups about the regulatory definition of "serious health condition" as having written "serious" out of serious health condition. For example, the University of Minnesota stated:

The current definition of "serious health condition" is broad enough to cover minor illnesses that were not intended to be covered by the Act. * * * The University's experience indicates that the regulatory tests set forth in section 825.114(a) of the FMLA regulations renders the limitations in section 825.114(c) inoperative. Specifically, the test set forth in section 825.114(a)(2)(i) (period of incapacity lasting more than three days) is broad enough to cover minor illnesses, like the ones referenced in section 825.114(c). Such minor illnesses are regularly the subject of FMLA leave requests. Because physician certifications seldom use terms like "common cold", "upset stomach", "ear ache", etc., the University does not feel it can deny the requests, even when the University is convinced the illness is minor. As indicated in section 825.114(c), such minor illnesses were not intended to be covered by the Act.

University of Minnesota, Doc. 4777A, at 1-4. "Please redefine serious medical

condition to cover truly serious needs, not the common flu." Debbie Robbins, Human Resources, City of Gillette, Doc. 5214, at 1. "[T]he intent of the regulations was not to find conditions such as the flu, earaches, headaches, and upset stomach qualifying; however, as a result of DOL opinion letters it is practice for FMLA to be granted for these conditions when the regulatory criteria defining a serious health condition [are] met." Carle Clinic Association, Doc. 5449A, at 1. "The DOL needs to limit the definition of serious health condition to what it was originally intended by Congress. For example, while a common cold or flu were never intended to be serious health conditions, in case law courts have essentially done away with all the exclusions from the original definition by stating that 'complications' (without defining this) could cause virtually anything (a cold, an earache, a cut on finger) to become a serious health condition." Coolidge Wall Co. LPA, Doc. 5168, at 1. "As [the definition of a 'serious health condition'] has been interpreted, a common cold or flu bug lasting three days creates a FMLA qualifying event. * * * As it is, a 'runny nose' for three days would qualify as long as you saw the doctor for it. To call a 'common cold' a serious health condition significantly devalues the FML Act." Mark Costa, Human Resources Director, Team 1 Michigan, Doc. 5172, at 1. "[T]he current Regulations seemingly extend coverage to considerably more than just serious health conditions and, in practice, the general definition often swallows up the so-called 'minor ailment exception.'" Proskauer Rose LLP, Doc. 10182, at 5. "Contrary to what Congress intended, the DOL regulation bypasses 'serious' in 'serious health condition' by assuming a condition is serious if an employee can get a physician to certify [that] he/she cannot work for three or more days and that he/she has seen a health care provider at least once and was prescribed continuing treatment by that health care provider, or that the employee has seen a health care provider twice regardless of whether any continuing treatment was prescribed." Southwest Airlines Co., Doc. 10183A, at 9.

The Department also received many comments from employees and employee groups, however, who felt that the objective test is a good, clear test that is serving its intended purpose. "[T]he current regulations are crafted appropriately to provide guidance on what constitutes a serious health condition without imposing overly rigid

criteria that could hinder the ability of workers to take leave when necessary." National Partnership for Women & Families, Doc. 10204A, at 7. "[N]o definition, if it is to be effective, can impose precise categories for every health condition. The practical reality is that serious health conditions will differ from person to person. Thus, the regulations must necessarily have the flexibility to be applied to different individual circumstances." Faculty & Staff Federation of Community College of Philadelphia, Local 2026 of the American Federation of Teachers, Doc. 10242A, at 4. A letter from 53 Democratic Members of Congress also lauded the current definition of serious health condition as both expansive and flexible. The letter cited congressional intent of a "general test" that defines serious health condition: "We urge the Department to adhere to that test. Ultimately, Congress and the Department are not physicians, and we cannot evaluate every medical condition or necessary course of treatment. The presence of a serious health condition is something that is readily determined by medical professionals[.]" Letter from 53 Democratic Members of Congress, Doc. FL184, at 2. "To protect employers from employee abuse of this provision, the regulations establish an objective criteria to be used to determine whether conditions presented qualify for leave. This criteria creates a standard that can be applied in individual cases with sufficient flexibility to adjust for differences in how individuals are affected by illness. It also specifies that routine health matters cannot be considered serious health conditions, unless complications arise." Families USA, Doc. 10327A, at 3.

The AFL-CIO emphasized that the current objective test in the regulations best reflects congressional intent to cover health conditions that have a "serious" effect on the individual regardless of the label of the impairment or illness. See Doc. R329A, at 21-24. "The regulations correctly do not define serious health condition by relying on nonexhaustive [e]xamples of serious health conditions that Congress provided in the legislative history to the Act * * * [but rather by defining] a serious health condition as an illness, injury or impairment, or physical condition that requires either inpatient care * * * or continuing treatment by a health care provider. * * * [W]e believe that the brightline tests set forth in Section 825.114(a) continue to provide the best means of determining what qualifies as a serious health condition." *Id.* at 22, 24 (quotation marks and

citations omitted). The Coalition of Labor Union Women concurred: "Not only does this definition establish an objective basis for determining when an individual employee will and will not qualify for leave, but it also recognizes that every individual is different and thus likely to experience a particular medical condition differently from others. Our members have described various medical problems that affected them or their family members and reported how many supervisors or managers express a biased attitude toward these medical conditions based on a stereotypical view of the condition." Doc. R352A, at 3. Moreover, the Communication Workers of America provided a relevant example of a worker being uniquely affected by a common illness: "An employee of Verizon experienced an extreme allergic reaction to poison oak which made it impossible for her to sit or perform regular job functions for a week. The FMLA protected her during this period." Doc. R346A, at 12-13.

Finally, the Legal Aid Society pointed out that after Wage and Hour Opinion Letter FMLA-86 (Dec. 12, 1996), the meaning of "serious health condition" should be perfectly clear to the regulated community. It simply may not be as "serious" as some would like:

With all due respect, there should not be any significant confusion over this definition. It is clearly defined in the regulations. Perhaps the term "serious health condition" is somewhat of a misnomer because it may cause the uneducated employer to assume that the medical condition must be sufficiently grave to warrant leave. However, the educated and compliant employer will be familiar with this key regulation. Indeed, the regulations make this definition quite clear, and should be used as a road map for ascertaining whether a medical condition constitutes a "serious health condition" within the meaning of FMLA. Moreover, the regulations make it perfectly clear that an employer is required to "inquire further" should it need more information to make this decision.

The Legal Aid Society-Employment Law Center, Doc. 10199A, at 2.

There was also no shortage of answers to the two questions we asked in the RFI: whether the limitations in section 825.114(c) have been rendered inoperative by the regulatory tests set forth in section 825.114(a), and whether there is a way to maintain the substantive standards of section 825.114(a) while still giving meaning to section 825.114(c) and congressional intent that minor illnesses like colds, earaches, etc., not be covered by the FMLA. Below are some of the most common answers and suggestions we received.

1. Section 825.114(c) Imposes no Independent Limitation on Serious Health Condition and Therefore Need Not Be Changed

One common suggestion proffered for reconciling sections 825.114(a)(2) and (c) is to construe the list of ailments in subsection (c) as imposing no limitations on the definition of serious health condition. "We do not agree * * * that Section 825.114(c) places 'limitations' on Section 825.114(a)'s regulatory tests." American Federation of Labor and Congress of Industrial Organizations, Doc. R329A, at 21. The AFL-CIO noted that Congress did not express a specific intention to exclude "minor illnesses like colds, earaches, etc.," but rather to exclude from serious health condition only "short-term conditions [whatever named] for which treatment and recovery are very brief[.]" American Federation of Labor and Congress of Industrial Organizations, Doc. R329A, at 21 n.34 (quoting S. Rep. No. 103-3, at 28). Thus, "subsection (c) [only] clarifies that certain conditions are not serious health conditions for FMLA purposes unless they meet all of the regulatory measures of subsection (a). * * * [T]hese examples do not modify or limit the objective tests set forth in subsection (a).]" *Id.* at 23.

These commenters believe section 825.114(c) is merely an illustrative list of conditions that usually would not qualify as serious health conditions, but that the objective test is what matters and what is applied: "Section 825.114(c) of the regulations includes a list of conditions that ordinarily would not be considered serious health conditions, such as the common cold, the flu, earaches, or an upset stomach. But the regulation on its face also makes clear that complications can arise to make what is usually a routine health matter much more serious." National Partnership for Women & Families, Doc. 10204A, at 8. "The list of conditions set out in 825.114(c) is useful in setting out what 'ordinarily' would not be a qualifying serious health condition[.] * * * But the operative word in 825.114(c) is 'ordinary.' While these conditions would not 'ordinarily' constitute a serious health condition, there are extraordinary situations where these conditions do just that. In determining what those situations are, all employers have to do * * * is apply 'the general tests' * * * that were incorporated into the Department's regulations at 825.114(a)." Association of Professional Flight Attendants, Doc. 10056A, at 2 (citations omitted). "The existing regulations properly define 'serious health condition' by applying

objective criteria, including the duration of an illness and the number of treatments, to a worker's individual case, rather than categorically excluding any set of health conditions from FMLA coverage." Faculty & Staff Federation of Community College of Philadelphia, Local 2026 of the American Federation of Teachers, Doc. 10242A, at 3. "As long as a diagnosis meets the 'objective criteria' of subsection (a), then subsection (c) makes it clear that the employee has a 'serious health' condition that qualifies for FMLA leave." American Federation of Labor and Congress of Industrial Organizations, Doc. R329A, at 23.

This view, commenters maintained, is the correct interpretation of the Act: "The statute itself recognizes the need for such flexibility. Congress expressly chose to forego excluding any conditions from the definition of a serious health condition and instead defined a serious health condition according to objective criteria." Women's Employment Rights Clinic, Golden Gate University School of Law, Doc. 10197A, at 5.

Commenters favoring a flexible definition of "serious health condition" generally believed no changes to the regulatory definition are necessary. "In light of [our] experience, we do not believe that there is any need to retreat from the existing regulatory definition of a 'serious health condition.'" Communication Workers of America, Doc. R346A, at 7. "We urge DOL to retain the regulatory language in 29 CFR 825.114(a) and not to alter those provisions so that conditions like earaches, flus, and similar illnesses can never constitute a serious health condition." Women's Employment Rights Clinic, Golden Gate University School of Law, Doc. 10197A, at 5. "We strongly oppose any efforts to restrict or narrow the definition of a serious health condition. The FMLA enables eligible workers to take family or medical leave for serious health conditions, and its regulations establish objective criteria to be used to determine whether conditions qualify for leave. While the regulations set parameters to help define serious health conditions, they do not include an exhaustive list of conditions deemed 'serious' or 'not serious.'" National Partnership for Women & Families, Doc. 10204A, at 7. "Imposing additional requirements on the nature or length of treatment, or the duration of incapacity, will inevitably exclude, with no basis whatsoever, serious medical conditions from the ambit of the FMLA. The Department should resist making any changes in the definition of serious health condition." American Federation

of Labor and Congress of Industrial Organizations, Doc. R329A, at 24. "I strongly oppose any changes to eligibility standards that would impose additional barriers for workers seeking FMLA leave, [and] regulatory revisions that would scale back the definition of 'serious health conditions' covered under the act[.]" Judith Stadman Tucker, The Mothers Movement Online, Doc. 4766, at 1. "It is especially important to me that the definition of 'serious health condition' is not narrowed and that leave remains flexible." An Employee Comment, Doc. 4790, at 1. "Altering the definition [of serious health condition to ten days or more] will leave out numerous serious conditions from pneumonia to appendicitis where a person could be treated and be back on the job under 10 days. We are concerned that altering the definition of a serious health condition will remove much needed job protection for millions of Americans when they need it most." Women's City Club of New York, Doc. 10003A, at 1. "We are strongly opposed to any revisions to the regulation that would narrow the current definition. As the regulation is currently written, it adequately addresses the fact that some conditions (e.g., a head cold) can grow into a serious health condition needing repeated treatment and an absence from work of more than three days." University of Michigan's Center for the Education of Women, Doc. 10194A, at 1. "Imposing categorical changes to the definition of serious health condition, such as increasing the required number of days of incapacity, could have a devastating impact on employees." Service Employees International Union District 1199P, Doc. FL104, at 2.

2. Section 825.114(c) Should be Converted into a Per Se Rule.

Other commenters took essentially the opposite tack: that the congressional intent to exclude minor illnesses (reflected in section 825.114(c)) has been rendered inoperative by the objective test and that the Department should breathe life into subsection (c) by making it more of a per se rule as it was interpreted by Wage and Hour Opinion Letter FMLA-57 (Apr. 7, 1995). Employers were largely in agreement that the regulatory list of ailments has been rendered inoperative: "[T]he limitations in Section 825.114 (c) have been rendered inoperative by the regulatory test in Section 825.114(a) largely by the interpretation of the Department in holding that even minor illnesses can meet the definition of 'serious health condition.'" ORC Worldwide, Doc. 10138A, at 2. "Section

825.114(c) * * * has been rendered effectively inoperative by the regulatory tests set forth in Section 825.114(a). * * * Wage and Hour letter of interpretation of December 1996 expanding 'serious health condition' to include colds and flu further erodes Section 825.114(c)'s potency as a brightline standard for what does not constitute a 'serious health condition.'" U.S. Chamber of Commerce, Doc. 10142, at 9. Some commenters pointed to legislative history from 1990-1991 that shows Congress expressly considered ailments like colds and flus and intended them not to be covered:

The bill we are talking about requires medical certifications of serious illnesses. We are not talking about a child with a cold. We are not talking about a parent with the flu. We are talking about a child with cancer who must have radiation treatments. We are talking about an elderly parent recovering from a stroke who needs home care.

Pilchak Cohen & Tice, P.C., Doc. 10155A, at 8 (quoting Senate hearing). These commenters also cited to similar words spoken by a co-sponsor of the FMLA: "We're talking about a seriously ill child, not someone who has a cold here." *Id.* at 8 (quoting statement of Senator Dodd at Senate hearing).

This group of stakeholders suggested that unless verifiable medical complications arise, the health conditions in the section 825.114(c) list—such as colds and flus—should never qualify as serious health conditions. "[T]he easiest solution to this dilemma is to rescind opinion letter FMLA-86 and carve minor illnesses out of section 825.114(c). This carve-out should include a list of example ailments that do not qualify as serious health conditions absent serious complications—in much the same way opinion letter FMLA-57 attempted to do. This list should, at a minimum, include the common cold, the flu, earaches, an upset stomach, minor ulcers, headaches, routine dental or orthodontia problems, and periodontal disease." Porter, Wright, Morris & Arthur LLP, Doc. 10124B, at 2. "[Fairfax County Public Schools] urges the department to return to its earlier interpretations, which emphasize that minor ailments do not qualify as 'serious.' Section 825.114(a) should be modified so that it no longer contradicts section 825.114(c). * * * Additional examples of minor, nonqualifying illnesses would be a useful addition to this subsection." Fairfax County Public Schools, Doc. 10134, at 1. "[Section] 825.114(c) should be clarified in that even where the common cold results in more than three consecutive days of missed work or school, it is not

considered incapacitating or otherwise within FMLA's protections." Pilchak Cohen & Tice, P.C., Doc. 10155A, at 9. The Pilchak law firm further reasoned that if a cold or flu became truly incapacitating, "the illness would typically elevate to an ailment that is indeed within the FMLA's contemplation. For example, a common cold should never be an FMLA qualifying condition. However, if it progressed to pneumonia, then this is the type of incapacitating condition within the FMLA's contemplation." *Id.* at 9. "The substantive standards of section 825.114(a) cannot be maintained while giving meaning to section 825.114(c), and the legislative intent that not all conditions are covered cannot be secured unless and until section 825.114(c) is revised to state that, 'Unless complications arise, the common cold, the flu, ear aches, upset stomach, periodontal disease, and similar conditions are not serious health conditions and do not qualify for FMLA leave.' Absent such a revision, the DOL must further define other terms in Section 825.114(c), such as 'treatment.'" Fisher & Phillips LLP, Doc. 10262A, at 5. "[W]hen Congress passed FMLA, its intent was not to cover short-term illnesses where treatment and recovery are brief. By listing examples of conditions that would generally qualify and conditions that would generally be excluded, employers could reduce the use of FMLA leave for minor conditions in which treatment and recovery are brief. The Department should generally exclude from the list of conditions minor conditions such as colds, minor headaches, and flu and provide an improved definition of 'chronic conditions.'" National Business Group on Health, Doc. 10268A, at 2. *See also* Small Business Administration Office of Advocacy, Doc. 10332A, at 4-5 (collecting various proposals to exclude minor illnesses by name).

3. "More Than Three Days" Of Incapacity Should be Changed From Calendar Days to Work Days.

Another suggestion offered to give meaning to subsection (c) was to change the period of incapacity in the objective test from "calendar" days to "business" days. "The current regulations of the Department of Labor allow for protected leave when there is a 'more than three-day incapacity,' this should be defined as a 'more than three-day absence from work.'" Ken Lawrence, Doc. 5228, at 1. "My suggestion is that FMLA leave should have a waiting period, just like a disability plan. * * * Most truly serious health conditions, as defined by the act, last longer than 5 consecutive

business days and would warrant the need for the employee to be absent from work.” Cheryl Rothenberg, Human Resources Specialist, Doc. 4756, at 1. “[W]e suggest * * * [u]sing work days, rather than calendar days allows the employer to have actual knowledge of the employee’s incapacity * * * [I]t is difficult for the employer to verify employee incapacity over the weekend or to have knowledge sufficient to know that the employee might be in need of FMLA leave.” Foley & Lardner LLP, Doc. 10129A, at 2. “The current * * * ‘more than three-day incapacity’ * * * should be defined as a ‘more than three-day absence from work.’” Bob Kiefer, Baldor Electric, Doc. 5141, at 1. “Redefine a period of incapacity to mean a period of more than five work days or seven consecutive calendar days, instead of the current just more than 3 days of ‘incapacity, before an employee is qualified for FMLA leave.” U.S. Chamber of Commerce, Doc. 10142A, at 9. “We recommend that the definition be changed to ‘three work days.’ Health conditions that occur ‘over the weekend’ or other time off should * * * not be considered.” Lorin Simpson, Manager of Operational Systems & Labor Relations, Utah Transit Authority, Doc. 10249A, at 1. “[W]e request that the Department amend this provision to require an absence for a specified length of ‘consecutive scheduled work days’ rather than ‘consecutive calendar days.’ Employers are most likely to be unaware of employees’ sicknesses over a weekend so when employees take FMLA leave at the beginning of a workweek, this places a hardship on employers. With this clarification, employers will have advance notice of an employee taking FMLA leave.” National Business Group on Health, Doc. 10268A, at 7. “[I]f the three-day standard is maintained, this should be defined as three scheduled work days[.]” The Miami Valley Human Resource Association, Doc. 10156A, at 3. “I think it would help if the criteria for incapacity were 5 work days as opposed to three calendar days. * * * [Five] days would be consistent with most short term disability waiting period requirements and with many waiting period time frames for indemnity payments for workers compensation. (Kentucky has a 7 day waiting period prior to the start of workers comp indemnity payments.)” Sharon Pepper, Doc. 5325, at 1.

4. The “Treatment Two Or More Times by a Health Care Provider” Must Occur During the Period of Incapacity.

Many commenters suggested the Department maintain the substantive

language of both regulatory sections but explicitly adopt a recent United States Court of Appeals interpretation of the regulations that the “treatment two or more times by a health care provider” in subsection 825.114(a)(2)(i)(A) must occur during the period of “more than three days” incapacity. See *Jones v. Denver Pub. Sch.*, 427 F.3d 1315, 1323 (10th Cir. 2006) (“[U]nder the regulations defining ‘continuing treatment by a health care provider,’ the ‘[t]reatment two or more times’ described in 825.114(a)(2)(i)(A) must take place during the ‘period of incapacity’ required by 825.114(a)(2)(i).”). “The Regulations need to be clarified to state that each examination must occur during the period of incapacity that has resulted in an employee’s absence from work.” South Central Human Resource Management Association, Doc. 10136, at 4. “WMATA proposes that an individual’s illness or incapacity require the treatments by a health care provider to occur during the period of incapacity (rather than, for example, weeks later) in order to qualify as a serious health condition.” Washington Metropolitan Area Transit Authority, Doc. 10147A, at 2. “We urge the Department to * * * require the employee or covered family member to be treated on two or more occasions during the period of incapacity and delete the reference to treatment on one occasion plus a regiment of continuing treatment.” The Miami Valley Human Resource Association, Doc. 10156A, at 3.

5. The Period of Incapacity Should Be Increased From “More Than Three Days” to a Greater Number of Days

A number of stakeholders suggested reconciling the two regulatory provisions by simply tightening the requirements for qualifying for a serious health condition under the objective test. The primary suggestion (though by no means the only one) was to increase the minimum number of days an employee needs to be incapacitated to qualify for a serious health condition. Stakeholders suggested changing the current regulatory threshold of “more than 3 days” to as many as “10 days or more.” Miles & Stockbridge, P.C., Doc. FL79, at 2. “I would like to see the definition changed to require someone to miss work for at least a full week before it would qualify as FMLA, requiring 4 full days is at least a start.” Ed Carpenter, Human Resources Manager, Tecumseh Power Company, Doc. R123, at 1. “[W]e would recommend that the Department expand the more than three-day period in 825.114(a)(2)(i) to more than seven days.

This would eliminate most minor illnesses and would also mirror more closely what employers have in their short-term and sick leave plans.” ORC Worldwide, Doc. 10138, at 2.

“Increasing the time to at least five work days would help in eliminating some * * * minor illnesses from coverage. Thus, the burden on physicians and employers would be reduced without significant impact upon employees with a serious medical situation.” American Academy of Family Physicians, Doc. FL25, at 1.

Oxbow Mining suggested that “‘serious health condition’ should be a period of incapacity of no fewer than ten (10) consecutive work days as defined by an individual’s work schedule.” Doc. 10104, at 1. The Society for Human Resource Management and the U.S. Chamber of Commerce both proposed that the required incapacity continue for a minimum of five business days or seven consecutive calendar days. See Society for Human Resource Management, Doc. 10154A, at 4; U.S. Chamber of Commerce, Doc. 10142A, at 9. “MedStar Health requests that this regulatory test be modified to utilize a more than five calendar days of incapacity requirement.” MedStar Health Inc., Doc. 10144, at 8.

“Incorporate a longer period for the time of incapacitation to five (5) days.” Kim Newsom, Personnel Director, Randolph County, North Carolina, Doc. 4764, at 1. See also Edison Electric Institute, Doc. 10128A, at 3 (“In order to limit FMLA leave to those conditions that are truly serious in nature, we believe the regulations should require a period of incapacity of more than five calendar days, the length of a typical workweek, before the condition may constitute a serious health condition.”).

Other stakeholders suggested ranges in their comments. Foley & Lardner stated the Department should “extend the number of days of incapacity required to qualify as a ‘serious health condition[]’ * * * from the current ‘more than three day’ period to five, seven or ten consecutive work days[, which] would exclude most common, non-serious conditions, such as flu, bronchitis, sinus infections and similar common illnesses.” Doc. 10129A, at 1. The Proskauer Rose law firm advocated “the extension of the three-day period of incapacity requirement to a five or ten day period of incapacity requirement.” Doc. 10182, at 6. “The definition should be revised so that the period of incapacity is at least five consecutive days or the average waiting period provided by employer short-term disability periods.” Detroit Medical Center, Doc. 10152A, at 2.

IV. Unscheduled Intermittent Leave

The Department asked several questions in the Request for Information about the use of the FMLA for unscheduled intermittent leave.⁵ This type of leave has long been a matter of particular concern for employers and employees alike, as shown by previous stakeholder input and public commentary presented during congressional hearings, as well as comments filed with OMB concerning the costs and benefits of regulations. The RFI sought comments on the following issues, among others:

- How the FMLA affects the ability of employers to enforce attendance policies;
- Whether unscheduled intermittent FMLA leave presents costs or benefits different from those associated with regularly scheduled leave;
- Whether the duration of FMLA leave affects the manner in which employers cover the work of employees taking leave;
- Whether and to what extent employees misuse unscheduled intermittent leave;
- How best to accommodate employers' operational concerns and employees' interests in legitimate unscheduled intermittent leave;
- Whether and to what extent concerns arise regarding employees not providing prompt notice when taking unscheduled intermittent leave;
- Whether and to what extent the use of unscheduled intermittent leave affects employee morale and productivity; and
- Whether the availability of intermittent leave reduces employee turnover.

Based on the number and tone of the comments the Department received, these questions, along with several related issues involving unscheduled intermittent leave, remain at the forefront of the debate regarding the FMLA and its regulations. The responses to the RFI generally fall into two categories: comments highlighting the disruption that unscheduled intermittent leave causes in the workplace, particularly when that leave is taken in a manner perceived by employers as "abusive"; and comments emphasizing the importance of this kind of leave for workers with certain types of chronic ailments. For example, according to one law firm, "[B]y far, the most problematic type of FMLA leave is unscheduled, intermittent leave due to

chronic serious health conditions." Foley & Lardner LLP, Doc. 10129A, at 3.⁶ Many employers echoed this view, indicating that unscheduled intermittent leave due to chronic conditions results in decreased productivity, is difficult to manage, and is ripe for "misuse." Yellow Book USA assessed the effects of unscheduled intermittent leave as follows:

The use of unscheduled, intermittent FMLA leave has a drastic negative impact on productivity and profits for employers. Larger employers, specifically, have a greater financial burden. Employers need to add additional staff in the Human Resources department to track the intermittent absence time used. Additionally, employers need to hire additional management staff to manage the employees on intermittent leave. Larger employers are forced to provide training to managers on a constant basis. Due to the unscheduled nature of intermittent FMLA leave, productivity is greatly impacted. The costs are many. Employers incur unexpected overtime costs, lost sales, missed deadlines, additional administrative costs and negative employee morale. From my experience, I can estimate that 30 intermittent FMLA leaves cost the company \$40,000 annually.

Doc. 10021A, at 4; *see also* National Association of Manufacturers, Doc. 10229A, at 9–10 ("Intermittent leave is the point in the FMLA where all the unintended harmful consequences of the law come together to cause an economic nightmare for manufacturers: unchallengeable ailments, unassailable and unannounced absences, and

⁶ Many of the same commenters who expressed concerns with unscheduled intermittent leave report little or no concerns with scheduled leave, even when taken intermittently. Sun Microsystems wrote:

When an employee notifies his/her manager that he/she is going out on a planned, intermittent leave there is usually an opportunity to: review the employee's revised work schedule needs during this leave; identify the work load requirements during the leave; and determine the most effective way to get the work completed given the available resources. This is the optimal scenario whereby the employee and his/her manager have the opportunity to create a plan that meets both of their needs, the needs of other employees and provides a smoother transition for the employee. On the other hand, unplanned intermittent leave, which may be unavoidable with some medical conditions is a significantly greater burden on the employer and co-workers.

Doc. 10070A, at 2. *See also* City of Portland, Doc. 10161A, at 2 ("An employee who is absent for frequent short periods of intermittent leave presents far greater challenges, including last minute staffing adjustments, abuse of leave issues and negative impacts on employee morale."). These differences are reflected in certain survey results from the Society for Human Resource Management, which found that "71 percent of respondents stated that they have not experienced challenges in administering FMLA leave for the birth or adoption of a child [but] 60 percent of SHRM members reported that they experienced challenges in granting leave for an employee's chronic condition." Society for Human Resource Management, Doc. 10154A, at 2.

unending burdens with no prospect of a remedy.").

Offering a very different perspective, many employees and/or their representatives commented that intermittent leave is expressly permitted by the FMLA and that employees who experience unscheduled absences due to chronic conditions are precisely those most in need of the FMLA's protections. The AFL-CIO stated:

Congress explicitly provided that employees have the right to take leave "intermittently or on a reduced leave schedule when medically necessary." * * * The availability of intermittent leave is crucial for families who struggle to balance work and family demands and is necessary for employees who suffer from chronic health conditions or who must provide care for family members with chronic illnesses. Congress's concern in 1995 for the difficult choices employees must make when faced with a healthcare crisis is even more relevant today: A growing number of employees find themselves in the "sandwich generation," faced with the dual responsibilities of caring for children and for elderly parents.

Doc. R329A, at 30. The Legal Aid Society's Employment Law Center shared similar concerns, asking the Department to "please be mindful of the employee who, in an ideal world, would not suffer from such devastating illnesses that wreck havoc on their own lives. Employees, too, struggle with chronic and episodic illnesses. The FMLA was specifically designed to provide leave in these instances." Doc. 10199A, at 5.

The Association of Professional Flight Attendants described chronic health conditions typically causing episodic periods of incapacity as perhaps the most important FMLA issue for its members, making the following observation:

Under [the employer's] no-fault absenteeism policy, these shorter, but perhaps more frequent and unscheduled absences are just as likely (and indeed more likely) to result in the kind of threat to an employee's job security that the FMLA was designed to protect against * * * But the availability of FMLA leave for chronic conditions resulting in episodic periods of incapacitation is of critical importance to flight attendants, in large part because of the environment in which they work.

* * *

Many workers suffer from a variety of incapacitating health conditions—*e.g.*, irritable bowel syndrome—that have required treatment over a long period of time, for ten or more years, and which result in periodic incapacitating episodes, but who are otherwise fully capable of performing even the most rigorous kind of work. It does no good to advise these employees, as [the employer] does, to apply for block leave under 825.114(a). While the employee can be expected to experience a number of

⁵ Commenters tended to use the terms "unscheduled" and "unforeseeable" to mean essentially the same thing: arising suddenly and with little or no opportunity for advanced notice.

incapacitating episodes over the course of the year (as in the case of migraines), it is unlikely that any one episode would last for more than three days. But employees who suffer from these recurring bouts of the same incapacitating health condition (whatever its cause) are not like employees who suffer the occasional cold or flu. The few absences experienced as a result of such common illnesses (once every two or three years) are unlikely to jeopardize an employee's job. But for the employee who suffers from a chronic recurring condition, they could experience three or four or even five unplanned absences a year, and their jobs could be jeopardized—but for the enactment of the FMLA.

Association of Professional Flight Attendants, Doc. 10056A, at 7, 9.

As already mentioned in Chapter I, the Department received many comments to the RFI from employees discussing how they were able to take FMLA leave at crucial times in their work lives and how critically important they viewed the FMLA in providing them job security when they needed it most. At the same time, the Department received many other comments from employers discussing their perceptions that the FMLA at times creates situations where some employees can misuse the rights or privileges established under the FMLA. In this chapter, we address the various issues raised in the comments related to unscheduled intermittent leave in three parts. We begin by providing the statutory and regulatory background, addressing the concepts of chronic serious health conditions, intermittent leave, and leave that is not foreseeable. Next, we discuss comments concerning the workplace consequences of unscheduled intermittent leave, including scheduling problems where employees taking intermittent leave provide little or no notice, loss of management control resulting from perceived employee "abuse," and the impact on employee morale and productivity. Finally, we examine comments addressing the benefits to employees of the availability of unscheduled intermittent leave.

A. Background

Employers and employees made frequent reference in their comments to coverage of chronic conditions under the definition of serious health condition. Both groups recognize that chronic conditions are a primary reason for unscheduled intermittent absence under the FMLA. Three legal concepts underpin the debate regarding unscheduled intermittent leave: Chronic serious health conditions, intermittent leave, and leave that is not foreseeable. Together, the interaction of these facets of the FMLA and its regulations give

rise to the issues addressed in this chapter.

1. Chronic Serious Health Conditions

There is no definition or specific mention of a "chronic" serious health condition in the Act. The House and Senate Committee Reports do, however, refer to conditions where "the underlying health condition or treatment for it requires that the employee be absent from work on a recurring basis * * * [A] patient with severe arthritis may require periodic treatment such as physical therapy." H. Rep. No. 103-8, at 40 (1991); S. Rep. No. 103-3, at 29 (1993). Because of this and other legislative history, the Department created a separate serious health condition definition (one of the six different definitions mentioned in Chapter III, which addresses serious health conditions) for "chronic" conditions. The interim 1993 regulations defined a serious health condition, in part, as a condition involving "[c]ontinuing treatment by (or under the supervision of) a health care provider for a chronic or long-term condition that is incurable or so serious that, if not treated, would likely result in a period of incapacity of more than three calendar days." 29 CFR 825.114(a)(3) (1993). "Continuing treatment" was further defined as:

(1) The employee or family member in question is treated two or more times for the injury or illness by a health care provider. Normally this would require visits to the health care provider or to a nurse or physician's assistant under direct supervision of the health care provider.

(2) The employee or family member is treated for the injury or illness two or more times by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider, or is treated for the injury or illness by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider—for example, a course of medication or therapy—to resolve the health condition.

(3) The employee or family member is under the continuing supervision of, but not necessarily being actively treated by, a health care provider due to a serious long-term or chronic condition or disability which cannot be cured. Examples include persons with Alzheimer's, persons who have suffered a severe stroke, or persons in the terminal stages of a disease who may not be receiving active medical treatment.

Id. § 825.114(b)(1)–(3).

The preamble to the interim regulations explained the creation of a separate "chronic" serious health condition that does not involve incapacity per se:

Because the statute permits intermittent leave or leave on a "reduced leave schedule" in cases of medical necessity, it is also clear that the Act contemplates that employees would be entitled to FMLA leave in some cases because of doctor's visits or therapy—*i.e.*, that the absence requiring leave need not be due to a condition that is incapacitating at that point in time. Thus, the legislative history explains that absences to receive treatment for early stage cancer, to receive physical therapy after a hospital stay or because of severe arthritis, or for prenatal care are covered by the Act. Therefore, the regulations provide that a serious health condition includes treatment for a serious, chronic health condition which, if left untreated, would likely result in an absence from work of more than three days, and for prenatal care.

58 FR 31794, 31799 (June 4, 1993). The preamble also explained that for certain chronic conditions, continuing treatment can include continuing supervision, but not necessarily active care, by a health care provider:

For any condition other than one that requires inpatient care, the employee or family member must be receiving continuing treatment by a health care provider. * * * In addition, there was concern about persons who have serious, chronic conditions such as Alzheimer's or late-stage cancer, or who have suffered a severe stroke, who obviously are severely ill but may not be receiving continuing active care from a doctor. Therefore, the rule encompasses such serious conditions which are under continuing supervision by a health care provider.

Some may argue that this approach may encompass health conditions that are not really serious, while others may view the approach as excluding certain situations that were intended to require the granting of FMLA leave. However, the Department believes the regulation's definition is most consistent with the statute and legislative history.

Id.

Under the final 1995 regulations, a chronic serious health condition was defined as any period of incapacity or treatment for such incapacity that: (1) "[r]equires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider"; (2) "[c]ontinues over an extended period of time (including recurring episodes of a single underlying condition)" and (3) "[m]ay cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.)." 29 CFR 825.114(a)(2)(iii)(A)–(C). As restructured, the final regulation did not retain from the interim regulation the requirement that, but for treatment, more than three days of incapacity would result. Nor did it retain the requirement of "continuing supervision" by a health care provider, instead requiring only "periodic visits"

to the health care provider. The final regulations also created separate categories of serious health conditions for conditions that are long-term and for which treatment is not effective, and for conditions that would likely result in a period of incapacity in excess of three days without treatment. *See id.* § 825.114(a)(2)(iv)–(v).

The Department described its treatment of chronic conditions as a reasonable approach to the unusual circumstances that surround chronic serious illnesses that often cause only episodic periods of incapacity:

The Department concurs with the comments that suggested that special recognition should be given to chronic conditions. The Department recognizes that certain conditions, such as asthma and diabetes, continue over an extended period of time * * *, often without affecting day-to-day ability to work or perform other activities but may cause episodic periods of incapacity of less than three days. Although persons with such underlying conditions generally visit a health care provider periodically, when subject to a flare-up or other incapacitating episode, staying home and self-treatment are often more effective than visiting the health care provider (*e.g.*, the asthma sufferer who is advised to stay home and inside due to the pollen count being too high). The definition has, therefore, been revised to include such conditions as serious health conditions, even if the individual episodes of incapacity are not of more than three days duration.

60 FR 2180, 2195 (Jan. 6, 1995).

The Department explained in the preamble to the final rule the nature of the comments received on the interim rule that had prompted restructuring the portion of the definition addressing chronic conditions. Some had contended that the duration of the absence was not always a valid indicator of serious health conditions that are very brief (*e.g.*, a severe asthma attack that is disabling but requires fewer than three days for treatment and recovery to permit the employee's return to work), or that the duration is simply irrelevant if a condition is sufficiently severe or threatening. Additional comments contended that seriousness and duration do not necessarily correlate, particularly for people with disabilities; that a fixed time limit fails to recognize that some illnesses and conditions are episodic or acute emergencies that may require only brief but essential health care to prevent aggravation into a longer term illness or injury, and thus do not easily fit into a specified linear time requirement; and that establishing arbitrary time lines in the definition only creates ambiguity and discriminates against those

conditions that do not fit the average. *See id.* at 2192.

A number of other comments stated that the interim rule definition was too restrictive and recommended that it be expanded to specifically include chronic illnesses and long-term conditions that may not require inpatient care or treatment by a health care provider. Other commenters took issue with the definition's characterization of "continuing treatment" for a chronic or long-term condition that is "incurable," contending that curability is not a proper test for either a serious health condition or continuing treatment, that curability is ambiguous and subject to change over time, and that many incurable disabilities require continuing treatment that has nothing to do with curing the condition (*e.g.*, epilepsy, traumatic brain injury, and cerebral palsy, conditions for which training and therapy help restore, develop, or maintain function or prevent deterioration). *See id.* at 2193.

In response to the comments received, the Department also modified and separated the portion of the interim rule's definition pertaining to long-term conditions by deleting the reference to the condition being incurable. Instead, the Department required that the condition involve a period of incapacity that is permanent or long-term and for which treatment may not be effective, but for which the patient is under the supervision of a health care provider rather than receiving active treatment. "Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease." 29 CFR 825.114(a)(2)(iv). The Department also created a separate definition to address serious health conditions that are not ordinarily incapacitating (at least at the current state of the patient's condition), but for which multiple treatments are being given because the condition would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, and listed as example conditions "such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), [and] kidney disease (dialysis)." *Id.* § 825.114(a)(2)(v). Multiple treatments for restorative surgery after an accident or other injury were also specifically cited. The previous requirement that the condition be chronic or long-term was deleted from this section because cancer treatments, for example, might not meet that test if immediate intervention occurs.

Comments received from employers in response to the RFI emphasize how

commonplace chronic conditions have become under the FMLA and how difficult it is for employers to determine or to monitor "incapacity" when self-treatment is involved. *See United States Postal Service, Doc. 10184A, at 4, 8–9* (Out of "1,077,571 instances where FMLA leave was requested and approved" resulting in over 2 million hours of protected FMLA leave taken, "leave taken intermittently for chronic conditions accounts for the largest category of FMLA conditions and constitutes almost 38% of all FMLA cases for 2006."); *Spencer Fane Britt & Browne LLP, Doc. 10133C, at 15* ("Of the six situations that fall within the current definition of 'serious health condition,' the 'chronic' conditions create the most problems for employers[.] The Act was never intended to cover sporadic absences from work on a permanent basis for the entire work life of an employee."); *Brian T. Farrington, Esq., Doc. 5196, at 1* ("The most troublesome part of the current regulations is the definition of a 'chronic' health condition. Under the current regulation, the only right the employer has to challenge or question an employee claiming a chronic health condition under 29 CFR 825.114(a)(2)(iii) is to go through the process described in 825.307(a). Once the existence of the condition has been established, the employee can then take off any time, with little or no notice, claiming a manifestation of the chronic condition, and the employer is powerless either to verify or control that absence.")⁷

2. Intermittent Leave

The second legal concept central to understanding the present debate regarding unscheduled intermittent leave is the increment in which employees may use leave. The Act provides for the taking of leave in small

⁷ Other comments to the RFI suggest that the Department arguably has rendered the "multiple treatments" component of the definition of serious health condition—29 CFR 825.114(a)(2)(v)—unnecessary. *See, e.g., Association of Corporation Counsel, Doc. FL31, at 14* ("[T]he inclusion in 29 CFR 825.114(a)(2)(v) of conditions that, if left untreated, could become serious is unnecessary and should be eliminated. Any period of absence needed to receive multiple treatments for a condition that could result in a period of incapacity for more than three days would likely fall under the definition of chronic health condition in section (iii). Indeed, the illnesses listed in the regulation (cancer, arthritis, and kidney disease) would be chronic health conditions."); *American Academy of Family Physicians, Doc. FL25, at 1* ("The categories of 'Serious Health Condition' are overly complicated and, in some cases, contradictory. For instance, category 6—'Multiple Treatments (Non-Chronic Conditions)' goes on to list as examples chronic conditions like cancer and kidney disease.")

blocks, or intermittently, in certain situations:

IN GENERAL.—Leave under subparagraph (A) or (B) of subsection (a)(1) shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise. Subject to paragraph (2), subsection (e)(2), and section 103(b)(5), leave under subparagraph (C) or (D) of subsection (a)(1) may be taken intermittently or on a reduced leave schedule when medically necessary. The taking of leave intermittently or on a reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the employee is entitled under subsection (a) beyond the amount of leave actually taken.

29 U.S.C. 2612(b)(1). Although the Act specifies that an employee's FMLA leave entitlement shall not be reduced "beyond the amount of leave actually taken," it does not specify what increment can be used to measure that amount. As set forth in the final regulations: "There is no limit on the size of an increment of leave when an employee takes intermittent leave or leave on a reduced leave schedule. However, an employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave, provided it is one hour or less." 29 CFR 825.203(d).

Comments submitted before the final regulations proposed a variety of changes to the rule, but none was accepted. Many comments from employers "urged that the taking of intermittent leave in increments of one hour or less was too burdensome" and attempted to limit the blocks of leave available to minimum amounts such as "half-days (four hours) or full days[.]" 60 FR at 2201. Still other commenters suggested "that the amount of intermittent leave available be limited to four weeks of the 12 week total available in any 12 months." *Id.* at 2202. The Department rejected any minimum limitations on intermittent leave beyond the units of time captured by an employer's payroll system because "it seemed appropriate to relate the increments of leave to the employer's own recordkeeping system in accounting for other forms of leave or absences." *Id.* The Department explained this position on the basis that the statute makes no provision for limiting the increment of leave and that "otherwise employees could be required to take leave in amounts greater than necessary, thereby eroding the 12-week leave entitlement unnecessarily." *Id.* Moreover,

[p]ermitting an employer to impose a four-hour minimum absence requirement would

unnecessarily and impermissibly erode an employee's FMLA leave entitlement for reasons not contemplated under FMLA An employee may only take FMLA leave for reasons that qualify under the Act, and may not be charged more leave than is necessary to address the need for FMLA leave. Time that an employee is directed by the employer to be absent (and not requested or required by the employee) in excess of what the employee requires for an FMLA purpose would not qualify as FMLA leave and, therefore, may not be charged against the employee's FMLA leave entitlement.

Id. at 2236.

In rejecting a four-hour minimum for intermittent leave in the preamble to the interim regulations, the Department suggested that such a limitation was unnecessary. The Department stated: "There are other protections for employers in the statute; for example, if leave is foreseeable, an employee is required to try to schedule the leave so as not to unduly disrupt the employer's operation[.]" 58 FR at 31801. The Department further predicted that incidents of unscheduled intermittent leave would be unusual: "[I]t is considered unlikely that an employee would have several short instances of intermittent leave on an emergency basis which qualify as serious health conditions." *Id.* Thus, the Department did not envision how commonplace unscheduled intermittent leave would become, at least as is now reflected in many of the comments submitted in response to the RFI. For example, the United States Postal Service reported to the Department that, out of 179,370 FMLA certifications and 2 million days of FMLA protected leave in 2006, almost 38% of all leaves were chronic and intermittent, and "76.8% of all FMLA leave hours associated with a chronic condition were unscheduled." Doc. 10184A, at 9.

3. Leave That Is Not "Foreseeable"

The third facet of the FMLA that contributes to the issues concerning unscheduled intermittent leave is the concept of leave that is not "foreseeable." The Act expressly provides that an employee must give 30 days notice if the need for FMLA leave is foreseeable. If 30 days' notice is not possible, the employee must give "such notice as is practicable." 29 U.S.C. 2612(e)(2)(B).

The Department's regulations on foreseeable leave mirror this language:

An employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious

health condition of the employee or of a family member. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable.

29 CFR 825.302(a). The regulations then define "as soon as practicable" to mean "as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case." *Id.* § 825.302(b). In the case of "foreseeable leave where it is not possible to give as much as 30 days notice, "as soon as practicable" ordinarily would mean at least verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee." *Id.* The regulations on unscheduled leave similarly require that "an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case." *Id.* § 825.303(a). As with foreseeable leave where 30 days notice is not possible, "it is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible." *Id.*

Some courts have found the Department's regulations difficult to interpret:

Except for the 30-day notice provision, [the regulations] do not clearly explain when leave is viewed as "foreseeable" or "unforeseeable." For example, if an employee learns of the need for leave only a day before the workday begins is the need for leave viewed as "foreseeable" or "unforeseeable"? What about a half-day? Or just two hours?

Spraggins v. Knauf Fiber Glass, 401 F. Supp. 2d 1235, 1239 (M.D. Ala. 2005); see also *Cavin v. Honda of Am. Mfg., Inc.*, 346 F.3d 713, 719 (6th Cir. 2003) ("The regulations do not so explicitly discuss employer notice procedures in the context of an employee's unforeseeable need for leave, noting only that when an employee requires emergency medical leave, an employer cannot require advance written notice pursuant to its internal rules and procedures.").

In a January 15, 1999 opinion letter deriving from the regulatory language discussed above, the Department rejected an employer's attendance policy that "assess[ed] points against an employee who fails to report within one hour after the start of the employee's shift that the employee is taking FMLA intermittent leave, unless the employee

is unable to report the absence due to circumstances beyond the employee's control." Wage and Hour Opinion Letter FMLA-101 (Jan. 15, 1999). The Department deemed this policy non-compliant, stating:

The company's attendance policy imposes more stringent notification requirements than those of FMLA and assigns points to an employee who fails to provide such "timely" notice of the need for FMLA intermittent leave. Clearly, this policy is contrary to FMLA's notification procedures which provide that an employer may not impose stricter notification requirements than those required under the Act (§ 825.302(g)) and that FMLA leave cannot be denied or delayed if the employee provides timely notice (under FMLA), but did not follow the company's internal procedures for requesting leave.

Id. The letter went on to provide guidance regarding how the notice provision works:

For example, an employee receives notice on Monday that his/her therapy session for a seriously injured back, which normally is scheduled for Fridays, must be rescheduled for Thursday. If the employee failed to provide the employer notice of this scheduling change by close of business Wednesday (as would be required under the FMLA's two-day notification rule), the employer could take an adverse action against the employee for failure to provide timely notice under the company's attendance control policy.

Id.

As a result of this letter, an employee must now be allowed two full days to report an unscheduled absence regardless of the facts and circumstances of the employee's individual case.⁸ What began as an illustrative outer limit of one or two working days notice by the employee to the employer of the need for leave has in effect evolved into the rule that an employee with a chronic condition can miss work without notifying the employer in advance of the need for leave and, in fact, notify the employer of this event two days later. "[The regulatory notice provisions have] been applied by the Department * * * to protect employees who provide notice within two days, even if notice could have been provided sooner under the

particular facts and circumstances." National Coalition to Protect Family Leave, Doc. 10172A, at 27.

B. Workplace Consequences of Unscheduled Intermittent Leave

The comments received in response to the RFI reflect the tension and complexity surrounding the workplace issues related to unscheduled intermittent leave: tension because these issues ultimately require striking the appropriate balance between an employee's ability to take job-protected leave due to unforeseen circumstances and an employer's ability to schedule its work; complexity because reaching that balance also involves considering, at a minimum, the FMLA's notice provisions, the definition of "chronic" serious health condition, the minimum permissible leave increments, and the interaction between the FMLA and an employer's own attendance-related policies.

The Society for Human Resource Management commented on the effect of unscheduled intermittent leave on employers:

Intermittent leave initially was intended to permit scheduled leave for planned medical treatments or physical therapy. Since the FMLA's enactment, however, regulatory interpretations of a "serious health condition" have brought many chronic conditions under that umbrella, thus enabling some employees to expand FMLA protections to the point of abuse * * * For instance, if an employee is approved for intermittent FMLA leave related to a chronic episodic condition for which there is no date certain when leave will be needed (arthritis and allergies), the employee may take unscheduled leave whenever s/he likes without further medical substantiation that the condition actually incapacitated the employee on each leave date. Under this frequent scenario, the employer has no ability to require confirmation that the employee was actually ill each time leave is taken. Conversely, if an employee attempts to take sick leave for a non-FMLA qualifying condition, the employer can require medical substantiation for each absence and can discipline the employee if medical or other substantiation for each absence is not provided, specifically based on employer policies.

Doc. 10154A, at 8.

In contrast, the comments submitted to the RFI on behalf of employee representatives suggested a markedly different view. For example, the AFL-CIO stated:

[T]he regulations currently permit employers to discipline employees, even when they are eligible for leave, if they fail to follow the rules. Employees are required to make reasonable efforts to schedule intermittent leave so as not to "disrupt unduly the operations of the employer." 29

U.S.C. 2612(e)(2)(a); 29 CFR 825.117. Employees must also give advance notice of thirty days before taking leave, or at least give notice as soon as practicable. 29 U.S.C. 2612(e)(2)(b) (2002); 29 CFR 825.302 (a)-(b). If an employee could have given proper notice but did not, the employer may delay the commencement of leave for thirty days until after notice. See *Gilliam v. United Parcel Serv., Inc.*, 233 F.3d 969, 971 (7th Cir. 2000) (employer entitled to delay leave 30 days where employee did not give notice of intent to take paternity leave until day after child's birth). See also *Kaylor v. Fannin Reg'l Hosp., Inc.*, 946 F. Supp. 988, 998 (1996) ("It is plaintiff's failure to adhere to the FMLA procedures for informing his employer of intermittent leave that is ultimately fatal to his claim."). An employer may deduct points under an attendance control policy from an employee who could have given advance notice and failed to comply with FMLA regulations. Dep't of Labor Op. Ltr. FMLA-101 (Jan. 15, 1999).

* * *
There is no empirical evidence of widespread abuse of intermittent leave, and the current regulations provide employers with procedures to ensure that only eligible employees take intermittent leave, that the leave taken is medically necessary, and that leave is scheduled at convenient times and as far in advance as possible.

Doc. R329A, at 33.

The comments in response to the RFI focused on the following workplace consequences of unscheduled intermittent leave: (1) Scheduling problems caused by employee absences with little or no notice, (2) loss of management control, and (3) impact on employee morale and productivity. We address these issues in turn.

1. Scheduling Problems Where Employees Taking Intermittent Leave Provide Little or No Notice

A number of comments identify the root of the problems with unscheduled intermittent leave as the Department's interpretation of the notice requirement, particularly the amount of notice an employee must give to his or her employer when the employee seeks FMLA protection for unscheduled leave. See, e.g., *Southwest Airlines Co.*, Doc. 10183A, at 6-7; *College and University Professional Association for Human Resources*, Doc. 10238A, at 7-8.

As mentioned above, Wage and Hour Opinion Letter FMLA-101 interpreting the regulations at 29 CFR 825.302 and 825.303 has given rise to an understanding in the regulated community that employers (1) are prevented from disciplining any employee for failing to comply with a policy that requires advance notice of the need for leave and (2) are required to treat leave as FMLA-protected as long as the employee provides the employer with "notice" within two days after the

⁸As one commenter stated, "Not only are employers' routine call-in procedures subordinated to the FMLA rule allowing notice 'within one or two working days of learning of the need for leave' (29 CFR 825.303(a)), another provision of the FMLA regulations, 29 CFR 825.208(e)(1), expands the time period to allow an employee to notify the employer that his or her absence was FMLA-protected up to two days after returning to work, even if the employee could have followed normal call-in procedures or provided notice earlier. This is another procedure that makes no sense in the context of intermittent leave for a chronic condition." National Association of Manufacturers, Doc. 10229A, at 12.

absence. As explained by the National Coalition to Protect Family Leave:

The phrase "as much notice as is practicable" is not well-defined. The current phrase puts employers in the difficult position of having to approve leaves where questionable notice has been given. The current regulatory definition—within one or two business days—has been applied by the Department to both foreseeable and unforeseeable leaves, and to protect employees who provide notice within two days, even if notice could have been provided sooner under the particular facts and circumstances. See Opinion Letter No. 101 (FMLA) (1/15/99) (proposed attendance policy, which would require employees taking intermittent FMLA leave to report absence within one hour after start of employee's shift unless employee was unable to do so because of circumstances beyond employee's control, violated FMLA because employees have two days to notify employer that absence is for FMLA-covered reason).

National Coalition to Protect Family Leave, Doc. 10172A, at 27. See also Temple University, Doc. 10084A, at 6.

Employer commenters to the RFI were nearly unanimous in their understanding that the FMLA permits an employee to wait until two days after an absence to advise his or her employer of the need for FMLA leave. This understanding, according to the commenters, combines with other issues—e.g., the definition of serious health condition, the minimum period for intermittent leave, and the inability to request additional medical information—to create a situation where employers lose much of their ability to manage their business:

The DOL regulations at 29 CFR 825.203 require employers to permit employees to take leave in the "shortest period of time the employer's payroll system uses to account for absences of leave, provided it is one hour or less." Many employers have payroll systems capable of accounting in increments as small as six minutes. Tracking FMLA leave in such small increments is extremely burdensome—particularly with respect to exempt employees, whose time is not normally tracked. In addition, CUPA-HR members have had difficulties scheduling around intermittent leave because it is hard to find a replacement worker for small increments of time and the regulations do not require employees to provide any advance notice of the need for leave. The DOL Opinion Letter FMLA-101 (January 15, 1999) exacerbates this problem by stating that an employer must accept notice of need for leave up to two days following the absence. These problems are evidenced by the overwhelming majority of respondents to our membership survey that reported problems with FMLA administration. More than 80 percent of respondents reported problems with tracking intermittent leave and close to 75 percent reported problems with notice of leave and unscheduled absences.

College and University Professional Association for Human Resources, Doc. 10238A, at 7–8.

Throughout the comments, employers explained why they believe the "two day rule" is impractical and tantamount to eliminating the ability of employers to adequately staff their shifts and/or discipline employees for violating standard workplace rules. The "two day rule" is thus described as unworkable:

[T]he DOL's informal practice of allowing employees to give their employers notice of FMLA leave up to two business days after the fact facilitates abuse * * * [T]his "two-day" practice of the DOL is also an arbitrary, unreasonable standard[.] * * * The DOL's two-day notice practice is not a promulgated regulation or rule, and indeed the DOL's practice conflicts with the FMLA and DOL's own regulations[.] * * * The DOL's informal two-day notice practice improperly allows an employee to remain silent and provide no notice to his/her employer for up to two full business days, even when the employee has the knowledge and means to give timely notice to their employer. As such, the DOL's informal two-day notice practice is an arbitrary standard that fails to recognize an employer's legitimate operational need for timely notice and that contradicts with an employee's statutory duty to provide such notice as is practicable.

Southwest Airlines Co., Doc. 10183A, at 6–8.

Employers also identified as an area of concern the closely related issue of their inability to enforce routine call-in procedures. Section 825.302(d) of the regulations, which addresses the issue of advanced notice in the context of foreseeable leave, provides:

An employer may also require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave. For example, an employer may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. However, failure to follow such internal employer procedures will not permit an employer to disallow or delay an employee's taking FMLA leave if the employee gives timely verbal or other notice. 29 CFR 825.302(d).

A comment from Wolf, Block, Schorr and Solis-Cohen identified what it believes to be the problems associated with section 825.302(d):

Another area of FMLA abuse involves the DOL regulations' limits on an employer's ability to require employees to comply with their customary call-out procedures. This is of particular concern for employees taking intermittent leave.

* * * [Section 825.302(d)] has been interpreted by the DOL to limit an employer's ability to impose a call-in procedure (e.g. requiring employees to call in and report their absence

within 1 hour of their start time) on employees who are absent from work for an FMLA related reason where the call-in procedure is more onerous [than] the verbal and written notice procedures set forth in 29 CFR §825.303. The inability of an employer to insist that employees on FMLA leave comply with a call-in procedure, such as in the previous example, invites abuse from employees who are medically approved for intermittent FMLA leave and, subsequently, give their employer little or no notice leading up to their sporadic absences.

Wolf, Block, Schorr and Solis-Cohen, Doc. 10093A, at 2.

Employers asserted that the call-in procedures, which are enforced routinely outside the FMLA context, are often critical to an employer's ability to ensure appropriate staffing levels. The Ohio Department of Administrative Services commented that:

Many state agencies have a call-in procedure that requires employees to personally call within a certain period of time prior to the shift if they will be unexpectedly absent that day. For agencies that employ this procedure, the advanced "call-in" serves as a crucial element of their attendance program, and enables the agency to adjust schedules and personnel to cover the absent worker's duties and responsibilities. This procedure is especially critical in institutional agencies that provide direct care and supervision of inmates or patients.

Doc. 10205A, at 3.

Employer commenters, however, were clear in their belief that the Department's interpretations have severely limited those employers who need to know in advance of any absence and have opened the door for misuse of FMLA leave:

[T]he current FMLA regulations reduce the effectiveness of [call-in procedures], as agencies are prohibited under the regulations from requiring advance notice of the employee's need for FMLA leave. Once an employee receives a certification for an ongoing chronic condition, leave can be taken on numerous occasions intermittently for the same condition and without advance notice. * * * This restriction leads to a greater potential for abuse, as employees may be tempted to use their certifications to justify tardiness. Current FMLA regulations require an employee to give notice of the need for FMLA leave "as soon as is practicable," which usually means within a day or two of learning of the need for leave.

Id. See also National Association of Manufacturers, Doc. 10229A, at 4, 12 ("65 percent of the requests received for intermittent leave were made either on the day of the leave, after the leave was taken, or without any notice. * * * [E]mployees with unscheduled intermittent leave routinely ignore mandatory shift call-in procedures (even if they are fully able to comply), wait two working days, as permitted by 29

CFR 825.303(a), and then report their absence as FMLA-qualifying”).

Wage and Hour Opinion Letter FMLA-101, discussed above, allows employers to discipline employees for failure to follow employer notice policies only where those policies are less stringent than the FMLA’s notice requirements.

The employer, however, could impose a penalty, *i.e.*, assign points under its customary attendance control policy, in a situation where the employee was in the position of providing advance notice, absent extenuating circumstances, of the need for FMLA leave and failed to provide the notice in accordance with FMLA’s requirements and the company’s notification policy, if less stringent than FMLA’s. Under this circumstance, the provisions of § 825.302(d) would not apply because of the employee’s failure to provide timely notice based upon FMLA’s requirements (§§ 825.302(a) and (b)).

Wage and Hour Opinion Letter FMLA-101 (Jan. 15, 1999).

This issue of an employer’s ability to enforce its own notice policies for employees taking leave has been litigated in the federal courts with varying results.⁹ Two appellate courts have addressed whether the application of employer policies requiring employees to notify a specific individual or office when requesting a leave of absence violates the FMLA and have reached differing results. In *Cavin v. Honda of America Manufacturing, Inc.*, 346 F.3d 713 (6th Cir. 2003), the U.S. Court of Appeals for the Sixth Circuit addressed an employer policy requiring an employee to formally

request a leave of absence from a specified department within three workdays of the first day missed. The employee called daily to report his absences to the employer’s security office, but failed to comply with the requirement to notify the correct department of his need for a leave of absence in a timely manner. The Sixth Circuit concluded that the employer’s policy did not comply with the FMLA, holding that “employers cannot deny FMLA relief for failure to comply with their internal notice requirements’ as long as the employee gives timely notice pursuant to the FMLA. *Id.* at 723. In denying the employer’s ability to enforce its workplace rule, the court determined that “[i]n permitting employers to develop notice procedures, the Department of Labor did not intend to allow employers in effect to undermine the minimum labor standard for leave.” *Id.* at 722.

In *Bones v. Honeywell Int’l, Inc.*, 366 F.3d 869 (10th Cir. 2004), the Tenth Circuit took a different approach, allowing an employer to enforce its own internal requirements governing whom an employee must contact regarding her absence. In *Bones*, the employee was terminated because she failed to report to work or to call her supervisor for three days. On the second day of her absence, she requested a leave of absence from the employer’s medical department; the employer’s policy, however, expressly stated that employees were required to follow the call-in procedure and that contacting the medical department was not sufficient. *Id.* at 875. The court did not directly address whether the employee had provided sufficient notice under the FMLA, finding that the issue had been waived. *Id.* at 877. The court went on to note, however, that “Bones was terminated because she did not comply with Honeywell’s absence policy; she would have been terminated for doing so irrespective of whether or not these absences were related to a requested medical leave.” *Id.* at 878.

2. Loss of Management Control

Employers commented frequently regarding what they see as the difficulty in maintaining control over the workplace when, in the employers’ view at least, employees “abuse” unscheduled intermittent leave in order to achieve some privilege or advantage to which they are not entitled. *See, e.g.*, National Association of Manufacturers, Doc. 10229A, at 4 (“As currently interpreted by DOL, the FMLA has become the single largest source of uncontrolled absences and, thus, the single largest source of all the costs

those absences create: missed deadlines, late shipments, lost business, temporary help, and over-worked staff.”). The commenters assert that because employers’ ability to use call-in procedures and other attendance control mechanisms is severely limited where the FMLA is involved, and because the FMLA allows few options for determining whether a specific instance of leave use is appropriate, situations arise where certain employees do as they wish, ignoring the employers’ rules, schedules, and staffing decisions. As described by one attorney:

In my practice, by far the biggest problem we face with the FMLA is intermittent leave * * * These employees typically use their intermittent leave in small increments day-to-day. Especially when based on the need to care for others or highly subjective factors, this leave is neither scheduled in advance nor susceptible of being scheduled. The end result is employees who, under the auspices of FMLA, we must * * * allow to come and go as they please without any regard for our business needs. From both a legal and practical point of view, the employer is at the mercy of the employee. As a practical matter, there is no effective or legally “safe” way for an employer to regulate or verify the legitimacy [of] an employee’s use of intermittent leave.

Peter Wright, Esq., Doc. 4760, at 1.

One employer made the following observation:

The most difficult and burdensome part of the FMLA is the intermittent FMLA. Many employees will request FMLA as soon as they are placed in the discipline system for attendance. Health care providers will complete the forms for some for any reason the employee requests. The provider does this in such a vague manner *i.e.* “chronic condition, unknown or lifetime length, unknown frequency that may prevent them from coming to work, may cause them to be late leave early or not be able to attend without notice.” This gives the employee the right to come and go as they please without giving the company the right to question or discipline.

FNG Human Resources, Doc. FL13, at 2.

Although not strictly limited to unscheduled intermittent leave use, a number of comments noted that employers cannot enforce their attendance policies—particularly “no fault” attendance policies—against employees on FMLA leave, which results in inconsistent treatment of those absent for non-FMLA-qualifying reasons. The Society for Human Resource Management summarized the issue:

Moreover, some employers’ sick or personal leave policies penalize repeated absences, even illness-related absences, which do not qualify for FMLA protection. (These are commonly called “no-fault” policies.) For a non-FMLA qualifying

⁹ Cases addressing employer policies have involved three types of employer policies. The first group involves employer policies requiring the employee to report an absence within a specific time frame (frequently one hour prior to the start of the employee’s shift). These types of employer policies present the clearest potential for conflict with the FMLA notice regulations. *Compare Spraggins v. Knauf Fiber Glass GmbH, Inc.*, 401 F.Supp. 2d 1235 (M.D. Ala. 2005) (holding that employer could enforce rule requiring employees to call in one hour prior to their shift unless it was impracticable for them to do so), with *Mora v. Chem-Tronics, Inc.*, 16 F.Supp. 2d 1192 (S.D. Cal. 1998) (holding that employer’s policy requiring employees to call 30 minutes prior to the start of their shift, regardless of circumstances, conflicts with FMLA notice provision). The second group involves employer policies requiring employees to call a specific office or individual to report an absence. *See infra* (discussion of *Cavin v. Honda of Am. Mfg., Inc.*, 346 F.3d 713 (6th Cir. 2004), and *Bones v. Honeywell Int’l, Inc.*, 366 F.3d 869 (10th Cir. 2004)). The final group of cases involves employer policies applied during the course of an employee’s FMLA leave. *See, e.g.*, *Callison v. City of Philadelphia*, 430 F.3d 117 (3d Cir. 2005) (upholding application of employer policy requiring employees on paid sick leave to call in when leaving home); *Lewis v. Holsum of Fort Wayne, Inc.*, 278 F.3d 706 (7th Cir. 2002) (upholding application of three-day no-call/no-show rule); *Gilliam v. UPS*, 233 F.3d 969 (7th Cir. 2000) (upholding application of three-day no-call rule).

condition, the employer can discipline and even terminate an employee who is repeatedly absent. This follows from the principle that regular attendance is generally required of every job and is essential to productive and smooth operations. With an FMLA-qualifying condition, however, the employer may not discipline the employee for any absences, no matter how frequent, unless and until the employee's leave entitlement is exhausted.

Society for Human Resource Management, Doc. 10154A, at 8.

The Edison Electric Institute was able to quantify the effect this position (and other FMLA-related positions) has had on its attendance:

In the year 1987 our sick leave usage averaged 89.2 hours per employee. In 1990 we implemented a No-Fault Modified Attendance Policy (point system) to control employee attendance. After the policy was in place for three years the sick leave usage dropped 70% (from 89.2 hours to 27.2 hours). However, since FMLA went into effect in 1993, sick leave usage has steadily increased each year. At the end of 2006 the average hours used per employee escalated to 78.2. This is a 188% increase over a thirteen year period. * * * We attribute most of this increase to the FMLA. Under the existing regulations 29 CFR 825.220(c) employers cannot use the taking of FMLA leave as a factor in employment actions, i.e., No-Fault Attendance policies.

Edison Electric Institute, Doc. 10010A, at 1.

The types of scenarios identified by employers as subject to "abuse" through the improper use of unscheduled intermittent leave include, among other things: (1) Employees using leave to cover for simple tardiness or a desire to leave work early, and (2) employees seeking to alter their work schedule through securing a different shift.

a. Arriving Late/Departing Early

Many employer commenters suggested that employees use unscheduled intermittent leave as a pretext to cover for their tardiness or to leave work early for reasons unrelated to a serious health condition. See Southwest Airlines Co., Doc. 10183A, at 4; Air Conference, Doc. 10160A, at 11 ("Under the current regulations, an employee could be tardy by nearly two hours every scheduled workday for an entire year and never exceed his allotment * * * [S]ome employees use this loophole to leave work early every day to be at home when their healthy children arrive home from school."); "[M]any employees use intermittent leave to cover for tardiness, creating a scheduling and attendance reliability issue for airlines."); Cummins Inc., Doc. 10340A, at 2 ("Our payroll system allows for increments as few as three

minutes, and one facility had over 200 incidents of three minute FMLA uses in 2005. We strongly suspect that our incidents of three minute FMLA leave are used to excuse tardiness rather than true FMLA leave."); DST Systems, Doc. 10222A, at 1 ("Increasing increment allowed may reduce inappropriate use of the FMLA which can be misused for late arrivals/tardiness instead of a legitimate FMLA reasons."); Methodist Hospital, Thomas Jefferson University Hospital, Doc. FL76, at 1 ("Having a major medical problem like surgery and receiving block time off without repercussion is not the issue. Intermittent leave on the other hand has created a hiding place for Employees who have absence issues. * * * Facilities are not looking to punish cancer patients who need chemotherapy on a weekly basis; we do need to question Employees that have intermittent problems on snow days when they call in for "intermittent leave" and hospitals have to struggle in providing last minute staffing.").

b. Obtaining a Preferred Shift

A number of commenters stated that some employees misuse the FMLA rules to secure for themselves a preferred schedule in the form of a shift different from the one legitimately assigned by the employer. See, e.g., Southwest Airlines Co., Doc. 10183A, at 2, 4 ("Far too many employees misuse unscheduled, intermittent FMLA leaves to set their preferred rather than assigned work schedules; to work shifts paying overtime but no show regular pay shifts; to get excused absences that would otherwise violate attendance rules; * * * FMLA usage plummets on December 25 Christmas Day each year when triple overtime is paid[,] * * * FMLA usage is near its peak the day before Christmas and jumps the day after, but somehow nearly all those employees who have been out on FMLA feel better on Christmas day and are able to come to work."); Roger Bong, Doc. 6A, at 4 ("We even had one individual during our busy period of time (where overtime was abundant) come in four hours before the start of their shift (2 hours at double time and 2 hours at time and one half) and then at the start of their regular shift go home on FMLA. In that way she would earn seven (7) hours of pay and leave while not working the shift (2nd shift) that she hated."); Air Conference, Doc. 10160A, at 4. ("[E]very airline has numerous examples of workers who bid a full-time, 40-hour week schedule, entitling them to maintain all corresponding full-time benefits, but who then cut short most work days with intermittent leave. In

other instances, reservation agents have been known to miss their regular shift—forcing the carrier to call-in another worker with overtime pay—and then report into work later that day for an overtime shift that pays a higher premium.").

A number of commenters expressed concern that compliance with the FMLA's intermittent leave provisions—particularly when taken for a chronic condition—often converted a full-time position into a permanent, part-time position:

DOL takes the view that an employee is entitled to an FMLA reduced schedule due to a serious health condition regardless of the fact that the condition is permanent and it is unlikely that the employee will return to full-time employment. (DOL Opinion Letter-97, July 10, 1998) If an employee has a reduced schedule with one full day off per week due to FMLA, this arrangement can go on indefinitely. This results, in effect, in the creation of a new part-time position * * *. [An employee can refuse] reasonable accommodation under the American[s] with Disabilities Act (ADA) but instead chose to continue with * * * reduced schedule under FMLA * * *. The regulations should not permit this.

Seyfarth Shaw LLP (on behalf of a not-for-profit health care organization), Doc. 10132A at 3. See also Sally L. Burnell, Program Director, Indiana State Personnel Department, Doc. 10244C, at 4 ("The issue here is that some intermittent FMLA leaves almost default into light duty assignments because supervisors must reassign work that the frequently-absent employee is responsible for to ensure that deadlines are met and services are provided to customers."); Madison Gas and Electric Company, Doc. 10288A at 2 ("Offering an employee the possibility of 12 weeks of intermittent, unscheduled absences makes the employer vulnerable to the discretion of the employee. An employee taking advantage of this provision can essentially work part-time, but reap the benefits of a full-time employee."); Air Conference, Doc. 10160A at 11 ("Some employees use this regulation to effectively convert a fulltime position to part-time when part-time work is not otherwise available or to receive a shift which they do not have the seniority to hold under a collectively-bargained seniority system.").

¹⁰ Several comments, in making this point, noted that it is possible for a "full-time" employee to use FMLA leave intermittently under these circumstances and not exhaust his or her yearly leave entitlement. For example, 12 weeks times 40 hours per week = 480 hours of intermittent FMLA leave entitlement per year, divided by 52 weeks = 9.2 hours of intermittent FMLA leave per week, divided by 5 days per week = 1.8 hours per day.

Comments from the University of Minnesota noted similar problems:

Dealing with such situations is extremely difficult. Supervisors do not know if the employee will come in to work on any given day. They do not know if the employee will work an entire shift. Employees will simply notify their supervisors, in many cases after the fact, that they have experienced symptoms and cannot come in to work, or must leave work early. A comment by a supervisor regarding a performance issue may result in the employee excusing himself/herself for the rest of the day. Without proper notice, a supervisor cannot make plans for a replacement * * *. Nonetheless, the current statutory and regulatory provisions provide employers with few options.

University of Minnesota, Doc. 4777A, at 2.

3. Impact on Employee Morale and Productivity

A very large number of comments addressed the effect that the FMLA (and unforeseeable intermittent leave in particular) has had on employee morale. The Department received comments emphasizing the positive aspects of the FMLA on employee morale and retention, as well as the negative impact on employee morale and productivity.

a. Viewpoint: the FMLA Improves Employee Morale and Retention

Most of the comments addressing the FMLA's positive impact on employee morale focus on the FMLA generally. Several of the commenters who described the FMLA's positive impact on morale relied on the 2000 Westat Report. *See, e.g.*, Faculty & Staff Federation of Community College of Philadelphia, Local 2026 of the American Federation of Teachers, Doc. 10242A at 8 ("The 2000 Westat Study found that 89% of employers reported that the FMLA has had either a positive or neutral effect on employee morale. The survey also reported that, of those who have taken on added duties when a co-worker has taken FMLA leave, over four in five (85%) say the impact on them was neutral or positive."); The Human Rights Campaign, Doc. 10179A, at 2 (same); 9to5, National Association of Working Women, Doc. 10210A, at 2 ("And more than 4 in 5 employees who have taken on added duties when a co-worker has taken FMLA leave say that the impact on them was neutral or positive.").

According to the Women's Employment Rights Clinic:

Studies clearly suggest that workplace flexibility, such as leaves for family obligations, increases employee retention * * *. [O]ther findings "strongly suggest that employers who provide greater opportunities for flexible work arrangements, have

supervisors who are more responsive to the personal and family needs of employees, and create a workplace culture that is more supportive of the worklife needs of employees have employees who are more satisfied with their jobs, more committed to their employers, and more likely to plan to stay with their current employers. Interestingly, none of these work-life supports necessarily impose direct costs upon employers, in contrast with conventional benefits."

Doc. 10197A, at 7–8 (citation omitted). *See also* Faculty & Staff Federation of Community College of Philadelphia, Local 2026 of the American Federation of Teachers, Doc. 10242A, at 8 ("The law promotes workforce stability by helping employees retain their jobs when an emergency strikes. We believe the FMLA is essential to greater employee retention and to reducing employee turnover, and it is crucial to preserve FMLA's protections in their entirety.").

A number of commenters focused on the benefits directly enjoyed by the employer:

Based on recent research, it is clear that the FMLA contributes to a more stable economy and workforce by helping employers retain their employees and reduce turnover. In the 2000 Westat study, 98 percent of employees taking FMLA leave returned to work after taking that leave. And of the employers who experienced cost savings due to the FMLA, more than three-quarters attributed their savings to decreased turnover. The Employment Policy Foundation reports that the average cost of employee turnover is 25 percent of an employee's total compensation. Not only does the FMLA support families, it also supports businesses. The FMLA has reduced these costs by creating an effective mechanism for employees to retain their jobs.

Families USA, Doc. 10327A, at 6 (footnotes omitted). *See also* The Human Rights Campaign, Doc. 10179A, at 2 ("Many companies and states know from experience that providing a safety net for all families is a good business decision."); 9to5, National Association of Working Women, Doc. 10210A, at 2 ("The Family Medical Leave Act is a win-win for employees and employers.").

Several comments from employees opined that the causes of decreased employee morale are not so much the result of the FMLA, but rather the employer's failure to manage effectively:

The primary method for covering for employees on FMLA leave is to assign their work to co-workers. Reportedly, this method of getting the work done has a negative affect on the morale of the employees who pick up the slack for their absent co-workers. Employers should not rely on co-workers to cover for absent employees as a matter of course. Rather, co-workers should be used to pick up the slack when no other option is

available. Most employees will need to take FMLA leave at some point during their career, and good management practices dictate that employers recognize this eventuality and plan for it.

Center for WorkLife Law, Doc 10121A, at 7.

b. Viewpoint: Unforeseeable Intermittent Leave Negatively Affects Employee Morale and Productivity

In contrast to the comments emphasizing the morale-related benefits of the FMLA generally, several employers commented that when co-workers perceive employees to be "abusing" the FMLA, morale and productivity suffer. As described by the Pennsylvania Turnpike Commission:

FMLA leave when abused/misused affects morale negatively. We have received phone calls from both employees and managers who are frustrated that an employee(s) at their work location call off for FMLA so they can be off for holidays and weekends. These call-offs may interfere with another employee's vacation request, requiring them to come to work while another employee uses their FMLA. We have heard these type of holiday/vacation FMLA requests called "get-out-of-jail-free" cards because there is no recourse that we have as an employer to enforce these types of abuses/misuses of leave. Employees will request a vacation day, and if that request is denied, they often call in sick for FMLA that day. Some employees have even bragged to others how easy it is to get the extra time off and how they use this time for vacation or other non-FMLA reasons.

Doc. 10092A, at 8. *See also* Dover Downs Hotel & Casino, Doc. 10278A, at 2 ("Here is an example of what occurs on a REGULAR basis. An employee requests a vacation at the last minute as she received an unexpected invitation for a week at the beach. The manager denies the request, citing the numerous others who were granted vacation for the week in question. The manager simply cannot afford to allow one more person to take that week off as it would incur overtime for others to cover for this one. This employee chooses to head to the beach anyway and calls the manager, citing only those magic words 'FMLA'. In this true scenario, we were inconvenienced—as were the employees who had to work overtime to pick up extra hours to cover for this employee.").

This sentiment is echoed in the comments of the National Coalition to Protect Family Leave:

The Coalition believes that the availability of FMLA leave can increase morale in the workplace, if the leave is used in accordance with the spirit and intent of the Act. Employees who take FMLA leave are generally satisfied, for not only are the employees able to retain their benefits, but

they also have job security. However, FMLA can also lead to low morale and decreased productivity in the workplace. When employees take unscheduled intermittent leave and even scheduled leave in large blocks of time, the morale and productivity may decline for the remaining employees. The employees who report to work must cover for their colleagues who take FMLA leave, often resulting in overtime. Both employers and employees have expressed concerns regarding the abuse of FMLA leave and, thus, the employees who report to work are the ones who suffer.

Doc. 10172A, at 51. *See also* Bendix Commercial Vehicle Systems, Doc. 10079A, at 4, 11 (“[FMLA leave] has a positive impact when it is believed to be used appropriately; however, when it is believed to be being abused, it has a very negative [effect]. It can build animosity towards coworkers for not pulling their weight, towards the employer because we are allowing the employee to abuse the FMLA and won’t do anything about it.”; “This means that coworkers have to be asked to do more to cover for the person who took the intermittent FMLA. This can create morale issues—employee not pulling their own weight.”).

Some employers report that employees themselves also identify morale issues associated with their coworkers’ use of FMLA:

There is a menacing, intangible cost to abuse of intermittent FMLA: it wears out fellow employees who must cover shifts and trips for those abusing FMLA. It dampens workplace morale and teamwork * * *. In 2006, Southwest employees * * * were asked what one thing they would change * * *. In response, employees provided hundreds of unsolicited comments about FMLA abuse and its negative [effect] on morale.

Southwest Airlines Co., Doc. 10183A, at 6.

Morale—Employees that are not utilizing the unforeseen, intermittent leave report feeling cheated. They come to work on time and work 40 hours each week. When they need time off, they utilize their vacation time. They also report that employees on unforeseen, intermittent leave indicate that they can and will abuse the system when they want to. As a result, more and more employees are applying for unforeseen, intermittent leave so they can take time off of work whenever they choose.

Yellow Book USA, Doc 10021A, at 1. *See also* An Employee Comment, Doc. 136, at 1 (“We have a serious problem with this where I work. There are several people who do take advantage of the system to the point where it is a problem for the other workers. There is no way for them to stop or control this either as they call in for 2 days, then are back before required to bring in a doctor’s excuse.”).

Other commenters addressed the perception of “abuse” of the FMLA by leave-takers or the overall “costs” of the FMLA. A postal employee commented “it seems to me many employees abuse the system * * *. I don’t think the employees lie about illnesses, but they milk the system to stay home as much as possible.” An Employee Comment, Doc. 188, at 1. An employee at a unionized factory commented that he had witnessed “a lot of abuse” of FMLA which created morale issues as well as additional costs to the company. An Employee Comment, Doc. 195, at 1. However, an employee in the transportation industry noted, “I do see people occasionally abuse sick leave but those people would abuse it regardless of FMLA.” An Employee Comment, Doc. 4684, at 1.

Several commenters contended that misuse of intermittent leave has a negative effect on employee retention and turnover. For example:

[I]t is common that morale problems begin to appear among the employees (collectively and individually) who are left to deal with an “intermittent” abuser in their production area and have to continually pick up the slack; however, while this last group may perhaps receive some benefit via overtime as a result, the more common result is diminishing morale which often results in increased turnover.

Krukowski & Costello, S.C. (on behalf of Legislative Committee of the Human Resource Management Association of Southeastern Wisconsin), Doc. 10185A, at 8.

Additional comments in response to the RFI described the impact of unforeseeable intermittent leave on employee morale:

[T]he availability of FMLA improves the morale of the employees that use it, while negatively affecting the employees who do not. Everyone knows the day may come when we all may need to use it; however, the fact that every individual has the ability to be certified and then be able to miss up to twelve weeks in a twelve-month period is very disheartening. There are individuals who will exhaust the twelve weeks and then miraculously can come to work everyday thereafter and once eligible, complete a new certification and start the [vicious] cycle all over again. We have no evidence that it improves employee retention, however, employees that already have attendance problems find themselves with a serious health condition and are then able to continue to miss work but are able to be excused instead.

AM General LLC, Doc. 10073A, at 2–3. *See also* Spencer Fane Britt & Browne LLP, Doc. 10133C, at 19–20.

C. The Importance of Unscheduled Intermittent Leave to Employees

Many commenters addressed the need for unscheduled intermittent leave. For example, one commenter described her personal experiences with her daughter’s chronic, serious health condition:

My daughter had a major asthma attack which caused a bronchial infection, swelling and bacteria in her throat * * *. [N]one of my daughter’s doctors have told her how many times she needed to see them. I’m quite sure if they knew the answer, it would have been written * * *. No one is capable of predicting an asthma attack or the severity of the attack; I just would like the assurance of knowing that if or when the situation should arise, I have the time off required to handle her needs without the threat of being * * * terminated.

An Employee Comment, Doc. 4395, at 1. Another commenter described her experience:

In 2003, my mother was diagnosed with end stage renal failure and had to immediately begin receiving dialysis treatments three times a week. Since then, I have been working a reduced work schedule which allows me to be able to help my mom with transportation to/from her treatments, doctor appointments, errands, etc. * * *. I was so thankful when my employer informed me of this law because it gave my mom peace of mind knowing that I would be available for her when she needed me. By me working only 32 hrs a week, instead of the normal 40 hr workweek, I have been able to act [as] an advocate/liaison for my mom with all of her doctors, specialists and treatments that she’s had to endure. Most importantly, it has allowed for my mom to feel independent with my help. I know that if the FMLA act [wasn’t] around, I would be losing a lot of time and money with my employer and my mom would probably be a burden to the society and maybe even be living in a rest home somewhere * * *. My mom will need dialysis treatments indefinitely but I end up taking leave without pay for most of the year[.]

An Employee Comment, Doc. 4773, at 1.

The AFL–CIO comments also included statements from individual employees detailing the importance of intermittent FMLA leave to affected workers:

Many of the responses to Working America’s 2007 online survey on FMLA stressed the importance of intermittent leave. A Human Services Supervisor in Easton, Pennsylvania, relied on intermittent leave to care for his terminally ill father:

By using the intermittent leave provisions of FMLA, I was able to help care for my Dad in the final stages of his terminal cancer, in his own home. I was grateful that he was able to spend his last days in the comfort of his house, as he desired, while I was able to maintain my employment status, which I desperately needed for my own family. Weakening this law, will only lead to the

further breakdown of already stressed family support systems.

A payroll and benefits administrator in Euclid, Ohio also cares for a sick parent:

My mother suffered a severe stroke 4 years ago. I use FMLA time to care for her at home and keep her out of a nursing home. I have two siblings who help with her care, so I only have to take intermittent leave. It's hard enough to care for a disabled parent without having to worry about losing your job * * *. It would break my heart and my mother's if I had to put her in a nursing home. The government should be finding ways to make it easier to take this leave, not make it harder.

American Federation of Labor and Congress of Industrial Organizations, Doc. R329A, at 30–31 (citation omitted).

The Center for WorkLife Law expressed its belief in the importance of unforeseeable intermittent leave for chronic conditions to working Americans:

Recent studies show that 65 percent of families with children are headed by two working parents or a single parent. One in four employed men and women has elder care responsibilities and one in 10 employees is a member of the "sandwich generation" with both child care and elder care responsibilities. For those working caregivers with a seriously ill child or family member, medical emergencies are a way of life. Intermittent FMLA leave allows these employees to be available to their families when they are needed most without the stress of losing their jobs. We cannot emphasize strongly enough that the availability of intermittent FMLA leave is critical for eligible employees caring for an ill child, spouse or parent with a serious chronic illness.

Doc. 10121A, at 5 (emphasis in original) (footnotes omitted).

V. Notice: Employee Rights and Responsibilities

The Department noted in its Request for Information that one consistent concern expressed by the employee representatives during stakeholder meetings was that employees need to be better aware of their rights under the FMLA. Awareness of FMLA rights and responsibilities is critical to fulfilling the goals of the statute, yet it has been a challenge since the inception of the FMLA. Employees learn of their rights and responsibilities through the notice provisions of the FMLA and its implementing regulations. The Department sought information in response to several questions concerning the notice provisions and how those provisions relate to employee awareness of their rights and responsibilities:

- Whether employees continue to be unaware of their rights under the Act and, if so, what steps could be taken to improve this situation.

- The Department noted that employers have reported that some employees do not promptly notify their employers when they take unforeseeable FMLA leave and requested information on the prevalence and causes of employees failing to notify their employers promptly that they are taking FMLA leave and suggestions as to how to improve this situation.

- What methods are used to notify employees that their leave has been designated as FMLA leave? What improvements can be made so that employees have more accurate information on their FMLA balances?

- Does the two-day timeframe for providing notification to employees that their FMLA leave request has been approved or denied provide adequate time for employers to review sufficiently and make a determination?

A. Background

The Act places notice obligations on both employers and employees. The notice provisions are scattered throughout the regulations, which further define the statutory requirements and also include additional notice obligations.

1. Employer Notice Requirements

The FMLA mandates that covered employers affirmatively notify their employees of their rights under the Act:

Each employer shall post and keep posted, in conspicuous places on the premises of the employer where notices to employees and applicants for employment are customarily posted, a notice, to be prepared or approved by the Secretary, setting forth excerpts from, or summaries of, the pertinent provisions of this title and information pertaining to the filing of a charge.

29 U.S.C. 2619(a). "Any employer that willfully violates this section may be assessed a civil money penalty not to exceed \$100 for each separate offense." 29 U.S.C. 2619(b).

In addition to the statutory posting requirement, the Department of Labor regulations flesh out employers' obligations to inform employees of their FMLA rights and responsibilities. See generally 29 CFR 825.300–825.301. In addition to repeating the statutory requirements, section 825.300 of the regulations requires some degree of bilingual or multilingual notice: "Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer shall be responsible for providing the notice in a language in which the employees are literate." 29 CFR 825.300(c).

Section 825.301 sets forth additional employer notice requirements, requiring the inclusion of information on the

employee's FMLA rights and responsibilities and the employer's policies regarding the FMLA in the pertinent employee handbook or through other means if the employer does not have such formal written policies. 29 CFR 825.301(a)(1)–(2).

The notice requirements set forth in section 825.301 derive from notice provisions found throughout the regulations. Within a reasonable time after the employee has provided notice of the need for leave, the employer shall provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining the consequences of a failure to meet these obligations. The written notice must be provided in a language in which the employee is literate and must include, as appropriate:

(i) that the leave will be counted against the employee's annual FMLA leave entitlement (see § 825.208);

(ii) any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so (see § 825.305);

(iii) the employee's right to substitute paid leave and whether the employer will require the substitution of paid leave, and the conditions related to any substitution;

(iv) any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments (see § 825.210), and the possible consequences of failure to make such payments on a timely basis (i.e., the circumstances under which coverage may lapse);

(v) any requirement for the employee to present a fitness-for-duty certificate to be restored to employment (see § 825.310);

(vi) the employee's status as a "key employee" and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (see Sec. 825.218);

(vii) the employee's right to restoration to the same or an equivalent job upon return from leave (see § 825.214 and 825.604); and

(viii) the employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (see § 825.213).

29 CFR 825.301(b)(1). "The specific notice may include other information—e.g., whether the employer will require periodic reports of the employee's status and intent to return to work, but is not required to do so." 29 CFR 825.301(b)(2). "The notice shall be given within a reasonable time after notice of the need for leave is given by the employee—within one or two business days if feasible." 29 CFR 825.301(c). The written notification to the employee that

the leave has been designated as FMLA leave “may be in any form, including a notation on the employee’s pay stub.” 29 CFR 825.208(b)(2).

2. Employee Notice Requirements

The FMLA also imposes a requirement on employees to notify their employers of the need for FMLA leave. The statute requires that in the case of foreseeable leave due to the birth of a son or daughter or the placement of a son or daughter with the employee for adoption or foster care, “the employee shall provide the employer with not less than 30 days notice before the date the leave is to begin * * * except that if the date of birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.” 29 U.S.C. 2612(e)(1). The same standard applies to foreseeable leave based on planned medical treatment for a serious health condition of the employee or the employee’s spouse, son, daughter, or parent. 29 U.S.C. 2612(e)(2).

“When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances.” 29 CFR 825.303(a). “An employer may also require an employee to comply with the employer’s usual and customary notice and procedural requirements for requesting leave. * * * However, failure to follow such internal employer procedures will not permit an employer to disallow or delay an employee’s taking FMLA leave if the employee gives timely verbal or other notice.” 29 CFR 825.302(d).

While the statute and its implementing regulations require the employee to provide notice of the need for leave, employees are not required to specifically request FMLA leave. The “employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed[.]” 29 CFR 825.302(c), 825.303(b). However, the regulations also state that “[a]n employee giving notice of the need for unpaid FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine the leave qualifies under the Act. * * * In many cases, in explaining the reasons for a request to use paid leave, especially when the need for the leave was unexpected or unforeseen, an employee

will provide sufficient information for the employer to designate the paid leave a FMLA leave.” 29 CFR 825.208(a)(1).

B. Awareness of Rights

The 1995 Commission on Leave Report found that 41.9% of employees at covered establishments had not heard of the FMLA. The 2000 Westat Report found that 40.7% of covered employees had not heard of the FMLA and nearly half the employees did not know whether the law applied to them. *See* 2000 Westat Report, at 3–8 and 3–9. One commenter cited these percentages and expressed a continuing concern that employees are not aware of their rights. National Partnership for Women & Families, Doc. 10204A, at 17.

Increasing employee and employer awareness of FMLA rights and responsibilities continues to be a challenge. *See* Madison Gas and Electric Company, Doc. 10288, at 3 (“Employees tend to be uninformed about many legal rights or employer benefit provisions. Employees seek ‘just in time’ information when they really need it.”). *See also* An Employee Comment, Doc. 10336A, at 12 (“People generally do not understand the law. If you address an employer’s human resources department, you can leave even more confused * * *. Overall, employee rights are not disclosed clearly to employees.”); Zimbrick Inc., Doc. FL125, at 9 (“Some employees are aware and others are not. However, this is no different than any other areas.”); An Employee Comment, Doc. 4646, at 1 (“[I]f my coworker did not inform me of FMLA I know I would have lost my job.”). One employer suggested that employees may be unaware of their FMLA rights due to the timing of when they receive information about FMLA. “If employees continue to be unaware of their FMLA rights, it may be because most employers will cover this at orientation. On the first day of the job, new employees are nervous and are overwhelmed with paperwork and work rules. Since FMLA won’t affect them until they have in the requisite 12 months with the company, they may shove that information to the back burner.” Elaine G. Howell, H.R. Specialist, International Auto Processing, Inc., Doc. 4752, at 1.

It appears that employees are not the only ones who could benefit from increased awareness of FMLA. An employee who took FMLA leave for the adoption of a daughter and later sued his employer for interfering with his FMLA rights and terminating his employment in violation of the FMLA stated that “Not only was I unaware of my [FMLA] protected status, but neither

was my management as they testified in court. [Company Name] did not meet their obligation to thoroughly explain FMLA leave to management and therefore they failed to provide adequate protection to their employees.” An Employee Comment, Doc. 167A, at 2. The Legal Aid Society-Employer Law Center commented:

Awareness of one’s FMLA’s rights in the workplace is woefully absent. In my experience, most litigation has been the result of supervisors who are simply ignorant about FMLA, its intended purpose and basic protections, and then, with no training or information, improperly deny FMLA leave to eligible employees with a legitimate serious health condition. Invariably, in every case that I have litigated, the key supervisor did not know that: (1) FMLA provides 12 weeks of leave for an eligible employee; (2) the leave can be taken on an intermittent basis; (3) existing health care coverage continues while an employee is on leave; (4) an employee has the right to be reinstated to her same or comparable job upon expiration of the leave; and (5) an employee who exercises their right to take FMLA leave may not [be] subject to retaliation.

Doc. 10199A, at 3–4. *See also* Center for WorkLife Law, Doc. FL64, at 6 (“Some employers fail to inform eligible employees about their right to take FMLA leave because of the employers’ or their managers’ own lack of knowledge or understanding of the law.”).¹¹

Other comments from employees and employee groups reported that many employees have some general awareness of the FMLA but do not know what the law is (e.g., whether it extends beyond leave for birth of a child) or whether it applies to them. A survey conducted by AARP of workers age 50 and over

¹¹ Private sector supervisors are subject to individual liability under the FMLA and therefore may be held liable if they violate an employee’s FMLA rights. *See* 29 U.S.C. 2611(4)(A)(ii)(I); 29 CFR 825.104(d). The Department is aware, however, that there is a conflict in the circuits and in the lower courts regarding whether public agency supervisors can also be held individually liable under the FMLA. *Compare Modica v. Taylor*, 465 F.3d 174, 186 (5th Cir. 2006) (“The most straightforward reading of the text compels the conclusion that a public employee may be held individually liable under the FMLA.”) and *Darby v. Bratch*, 287 F.3d 673, 681 (8th Cir. 2002) (“It seems to us that the plain language of the statute decides this question * * * This language plainly includes persons other than the employer itself. We see no reason to distinguish employers in the public sector from those in the private sector.”) with *Mitchell v. Chapman*, 343 F.3d 881, (6th Cir. 2003) (“Our independent examination of the FMLA’s text and structure reveals that the statute does not impose individual liability on public agency employers.”), *cert. denied*, 124 S. Ct. 2908 (2004) and *Wascura v. Carver* 169 F.3d 683, 686 (11th Cir. 1999) (holding based on the similarity of the definition of “employer” under the FMLA and the FLSA, and circuit precedent interpreting the term under the FLSA, that public officials are not individually liable under the FMLA).

revealed that, although 91 percent were generally aware of the FMLA, only 50 percent of those workers reported that they first learned of the FMLA through their employer, suggesting that “more can be done to improve employer-employee communication[.]” AARP, Doc. 10228A, at 3. A survey of Working America members by the AFL-CIO similarly showed that 53.9 percent of respondents were informed about their FMLA rights by their employers. *See* Doc. R329A, at 7. The survey also showed that 68 percent of the respondents had taken unpaid leave to care for themselves or a spouse, child, or parent during an illness, but did not know whether it was considered FMLA leave. *Id.* at 40.

Still other stakeholders report that employees’ awareness of their FMLA rights is not lacking. For example, the National Coalition to Protect Family Leave stated that “Coalition members believe that, in many cases, employees are well aware of their FMLA leave rights. Among unionized employers, coalition members report that unions routinely inform their members of their FMLA rights.” Doc. 10172A, at 39. One law firm representing employers agreed. Porter, Wright, Morris & Arthur LLP, Doc. 10124B, at 5 (“Today, 13 years after the Act’s passage, employees are very savvy about their FMLA rights—it’s the rare employee who does not know of the FMLA.”). Other stakeholders echoed the sentiment: “As indicated by the high usage of FMLA by employees at most of our member airlines, employees are fully aware of the rights available to them under this popular Act.” *See* Air Transport Association of America, Inc., and Airline Industrial Relations Conference, Doc. FL29, at 9. *See also* MedStar Health Inc., Doc. 10144, at 15 (asserting that “employees are not only aware of but, also, well educated on their FMLA rights”); National Association of Convenience Stores, Doc. 10256A, at 8 (“today’s employees are aware of their rights and obligations under FMLA long before they are hired”).

Suggestions we received for increased awareness include outreach efforts, public campaigns, increased dissemination of materials in both English and Spanish, on-line tools, and development of user-friendly FMLA materials that could be widely disseminated. *See* National Partnership for Women & Families, Doc. 10204A, at 17; Families USA, Doc. 10327A, at 4. One union stated that the “posting requirements for employers under FMLA do not go far enough in that they do not actively educate employees on their rights under FMLA. In addition to

posting FMLA basic facts as required by the regulation, employers should be required to give the information to employees, in writing, once they become eligible under the regulations with that employer. Contact phone numbers for the employer as well as detailed appeals process afforded to the employee should be provided, as well as recourse information for possible retaliatory practices by the employer.” United Transportation Union, Doc. 10022A, at 2.

Another union recommended that “employees should be expressly notified of their right to take intermittent leave.” International Association of Machinists and Aerospace Workers, Doc. 10269A, at 2. “This has proven a real problem for some of our members * * * An employee who suffers from a condition that is still being diagnosed, but doctors believe it is either lupus, a connective tissue disorder or rheumatoid arthritis, arrived late to work due to her condition on a number of occasions. This employee was completely unaware that she could take FMLA on an intermittent basis. She thought if she took any FMLA leave, she would have to stop working altogether, something her illness did not necessitate and something she could not afford to do.” *Id.* at 2–3. The Legal Aid Society-Employment Law Center also stated that few employers effectively advise employees about their rights and options under the FMLA. *See* Doc. 10199A, at 4. Therefore, when “a supervisor denies a legitimate leave, uninformed employees must make the difficult decision to take the leave in spite of the supervisor’s denial and risk losing their jobs.” *Id.* This commenter suggested that employers provide employee training so that the workers understand their rights.

The AFL-CIO suggested that the Department should consider regulations that require “employers to provide an individualized notice provision to employees on an annual basis,” and referred to another commentator who suggested requiring notice to employees at the point of hiring and annually thereafter. Doc. R329A, at 40. The Communication Workers of America reiterated that employees should receive documents that “explain their annual leave entitlement and the process for making application for FMLA leave.” Doc. R346A, at 9. It suggested that employers could improve employees’ awareness of their rights, as well as inform them of their individual eligibility status, by taking steps such as producing an annual FMLA document for them. One employee recommended that a “manager and/or HR should

formally contact the employee and notify them of the options available under FMLA. This should include a description of the protection and a review of what the employee needs to do to qualify for this protection (if anything). Employees should be clearly made aware of their obligations to the employer. Employees should be instructed when protection begins, when paid leave begins and ends (i.e. paid vacation until it is used up), and protection should be defined.” An Employee Comment, Doc. 167A, at 2–3.

The National Employment Lawyers Association similarly asserted that the regulations should require employers to take steps to provide workers with adequate information regarding their rights and responsibilities. *See* Doc. 10265A, at 4. One of its members suggested requiring employers to have such information in their handbooks and/or requiring employers “to produce a written statement of rights and responsibilities to an employee upon that employee’s first anniversary (if no handbook is issued).” *Id.* *See also* Coalition of Labor Union Women, Doc. R352A, at 2–3 (noting that many employees are not aware of their FMLA rights, and that employers do not provide them with the required information).

C. Employee Notice

As previously explained, employees have the responsibility to notify their employers of the need for FMLA leave; however employees are not required to expressly request FMLA leave or invoke their FMLA rights. A great deal of anecdotal information was provided concerning notices provided by employees as well as several suggestions on this subject.

1. Notice of the Need for Leave: Timing and Information Provided

Stakeholders offered several possible explanations for employees failing to provide notice of their need for leave, ranging from the employee’s relationship with his/her supervisor to not wanting the absence to count as FMLA:

It appears that reasons for employees failing to notify their employer in advance of FMLA leave-qualifying events vary depending upon the medical situation and the employee’s personality and relationship with his/her supervisor. For example, some employees discuss the possibility of surgery or childbirth informally with co-workers and then neglect to submit formal documentation in a timely manner perhaps assuming that the informal break room discussions are sufficient; other employees do not want supervisors or management to be aware of medical issues until the very last minute and

then provide only a bare minimum of information.

Another reason for delays is that employees seem to think that they can retroactively document most absences, whether foreseeable or not, and frequently submit the documentation after their return to work. Since in many cases these employees used accrued leave to cover their absences, it is often in the employer's interest to also designate the absence as FMLA leave whenever the employee provides the documentation of qualification.

It also appears that employees who have the option of using other accrued paid leave often do not mention the reason for that leave in order to avoid the absence being charged concurrently to FMLA leave. Employees without other leave options are very quick to request FMLA leave even for doubtful absences.

Sally L. Burnell, Program Director, Indiana State Personnel Department, Doc. 10244C, at 5. *See also* Elaine G. Howell, H.R. Specialist, International Auto Processing, Inc., Doc. 4752, at 1 (“As an H.R. Specialist that handles FMLA, I can tell you that we have had employees with a foreseeable leave that did not notify us of their need for leave. Some employees have scheduled surgery and used vacation time. We are unaware of it unless there are complications. * * * Many of our employees are very private of their medical needs, as they should be.”); Zimbrick Inc., Doc. FL125, at 10 (“We see several causes [for employee’s failing to notify employer]: (1) Employees’ lack of knowledge about FMLA; (2) employees don’t anticipate the need (for example[:] employee takes off on Friday to have surgery but due to medical complications can’t return to work on Monday); [and] (3) employees who know FMLA is 12 weeks and they try to scam the system by using vacation and sick time up first and then want 12 more weeks off.”). One stakeholder cited the need to provide medical certification of the serious health condition as a reason employees do not request FMLA leave. *See* FNG Human Resources, Doc. FL13, at 3 (“Employees refuse to request FMLA because some medical providers either refuse to complete the paperwork, complete it incorrectly or incompletely, or charge the patient up to \$50 to complete the required certification. Employees would rather do without the hassle, request sick pay for the days they are out, regardless of severity of their illnesses.”).

Some commenters do not see problems with employee notification as mentioned in the RFI and suggested maintaining the status quo. “Clearly, employees should notify their employers about their need for leave as

quickly as is reasonably possible, but it also is important to ensure that employees are not penalized unfairly when confronted with unexpected emergencies. We believe the regulations strike an appropriate balance to allow employees to take leave in emergency situations, and also to provide employers with information about the need for leave in a prompt manner.” National Partnership for Women and Families, Doc. 10204A, at 19. *See also* OWL, The Voice of Midlife and Older Women, Doc. FL180, at 2 (“OWL believes that the current notice from employee to employer in unforeseeable leave situations is adequate.”).

The majority of stakeholders offering information on this topic, though, highlighted the problems they see with the sufficiency of information provided by employees in notifying employers of the need for FMLA leave. “[E]mployees who call in because of their own or a family member’s medical condition do not necessarily provide sufficient information for an employer to make such a determination. Since what constitutes “sufficient” information is not clearly defined anywhere in the regulations, both employees and employers face difficulties in meeting their rights and responsibilities under the FMLA.” National Coalition to Protect Family Leave, Doc. 10172A, at 39–40. *See also* National Retail Federation, Doc. 10186A, at 16 (“Certain retailers report that paperwork is often not provided in a timely manner because the employee has failed to adequately communicate the reason prompting the leave request or has not shared the information with an appropriate manager.”); Jackson Lewis LLP, Doc. FL71, at 9 (“Much of the frustration employers experience in administering FMLA leaves stems from the difficulty employers have in “spotting” FMLA qualifying absences. Employers are not “mind readers” and they often refrain from asking employees why they are absent for fear that they may invade an employee’s medical privacy. It also is naive to think that employers can effectively train front line supervisors on the myriad of health conditions and personal family emergencies that might qualify for FMLA protection.”); Porter, Wright, Morris & Arthur LLP, Doc. 10124B, at 4 (“The first concern in this area relates to the type of notice an employee must provide to obtain FMLA leave. * * * Instead, they simply need to request time off and provide a reason for their request.”); National Association of Convenience Stores, Doc. 10256A, at 5 (“Employee notice is often vague or

non-existent, forcing employer representatives to make a discretionary “judgment call” in questionable situations time and time again.”).

The timing of employee notification of the need for leave was also mentioned by employers and employer representatives as a problem in their administration of the FMLA, particularly—as discussed in greater detail in Chapter IV—employee notice with respect to intermittent leave. “The last issue has to do with the fact that we are often not notified that an employee is out for a serious health condition until after they return to work and then we are unable to ask for medical documentation.” Jan M. Gray, Benefits Coordinator, Spokane County, Doc. 5441A, at 1. *See also* Suzanne Kilts, Doc. 5204, at 1 (“On our intermittent FMLA employees, we have had several occasions where the employee does not call in for his FMLA absence until minutes before their shift start. * * * Just last week I had an FMLA call off at 9:05 a.m. in the morning. That’s 2 hours and five minutes after their shift is to start.”); The Pennsylvania Turnpike Commission, Doc. 10092, at 6 (“The issue of [employees] failing to notify their supervisors promptly that they are taking FMLA leave is very prevalent in our company. Some employees that are approved for intermittent FMLA simply don’t show up for work, and then email or call their supervisor when the work day is almost over to inform them that they are taking FMLA. This is extremely frustrating as an employer, and there does not ever seem to be a valid reason that the employee could not notify the supervisor earlier.”).

2. Commenter Recommendations

The Department also asked for suggestions on how to improve the reported situation of employees not promptly providing notice to their employers of their need for unforeseeable FMLA leave. One commenter suggested “shifting the burden to the employee to request the leave be designated as FMLA leave in writing.” *See* Miles & Stockbridge, P.C., Doc. FL79, at 5. Other commenters suggested not only written leave requests but also that leave requests specifically mention FMLA. “It would eliminate many disputes if an employee were required to request leave in writing or to follow up an oral request with a written request within a reasonable time (such as within two work days after returning to work in the case of intermittent leave, or five work days after requesting leave in the event of unforeseen continuous leave). * * * It would help both parties immensely if

the employee were required to mention the FMLA when making such a request.” South Central Human Resource Management Association, Doc. 10136A, at 14; *see also* Spencer Fane Britt & Browne LLP, Doc. 10133C, at 39 (same). “Especially for intermittent use, require that employee provide specific FMLA notice when absences are necessary, relieving employer from identifying possible need of FMLA with timely designation based on limited information provided by employee[.]” DST Systems, Inc., Doc. 10222A, at 4.

Other stakeholders expressed a desire for more information from employees, but stopped short of suggesting a requirement that the employee must specifically ask for FMLA leave. “Employees should be required to specify the purpose of any instance of FMLA leave, such as a doctor’s appointment, physical treatment, etc. so employers can assess veracity when employees appear to be abusing the leave policy.” U.S. Chamber of Commerce, Doc. 10142A, at 11. *See also* Williams Mullen, Doc. FL124, at 2 (“DOL should implement detailed regulations which provide necessary language or actions that must be taken by employees to put their employers on notice of their intent to take FMLA leave.”); Association of Corporate Counsel, Doc. FL31, at 8 (“The DOL should revise its regulations * * * by making clear that an employee’s notice to the employer must go beyond merely requesting leave and must provide a basis for the employer to conclude that the requested leave is covered by the FMLA.”). However, some employers advocated for a requirement that employees specifically request FMLA leave, suggesting that the regulations should apply “to only those employees who request FML coverage.” Edison Electric Institute, Doc. 10010A, at 3. *See also* Spencer Fane Britt & Browne LLP, Doc. 10133C, at 42 (employers who have a written FMLA policy should receive “safe harbor” protection and be permitted to enforce procedural requirements such as that FMLA leave requests be in writing, that the FMLA be specifically mentioned, and that the requests go to a particular centralized source).

Several stakeholders recommended allowing employers to enforce employee compliance with established attendance and leave notification procedures, particularly with respect to intermittent unscheduled FMLA leave. “The regulations should expressly provide that the employer may enforce any generally applicable leave notification or call-off requirements, even if the FMLA is also involved.” Ohio Public

Employer Labor Relations Association, Doc. FL93, at 4. *See also* Association of Corporate Counsel, Doc. FL31, at 10 (“DOL should * * * make clear that an employee may be subject to an employer’s disciplinary process for failure to provide timely notice or to comply with the employer’s written notification policy.”); Miles & Stockbridge, P.C., Doc. FL79, at 4 (“A possible remedy * * * would be to require an employee taking intermittent leave to provide notice of the need to take intermittent leave consistent with the employer’s call out procedures and/or sick leave/absentee policy. Additionally, at the time of the employee’s call, the employee should be required to indicate that the reason for the absence is because of the FMLA qualifying chronic condition.”); National Association of Convenience Stores, Doc. 10256A, at 5 (“Employers should also have the flexibility to impose more stringent internal notice requirements upon employees, and to impose leave forfeiture provisions for their non-compliance.”); University of Wisconsin-Milwaukee, Doc. 10098A, at 4 (“Requiring employees to comply with regular attendance policies unless there is a ‘medical’ emergency would be one way to rectify the problem of employees failing to notify the employer of the need for unforeseeable leave. Intermittent, unscheduled FMLA does not necessarily imply a ‘medical emergency’ which makes regular notification impossible.”); American Electric Power, Doc. FL28, at 2–3 (“The regulations should be reformed to allow employers to enforce attendance policies that require employees to observe reasonable reporting-off protocols, including policies that require employees to report off to their direct supervisors or to a designated person in human resources.”).

D. Employer Notification That Leave Is FMLA-Qualifying

In order to allow employees to know when they are using their FMLA-protected leave, the regulations state that “it is the employer’s responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee.” 29 CFR 825.208(a). It is the Department’s intent that such designation occur “up front” whenever possible, to eliminate protracted “after the fact” disputes. *See* 60 FR 2180, 2207–08 (January 6, 1995).¹² Notification that the leave is

¹² In general, employers are required to designate leave as FMLA within two days of learning that the leave is being taken for an FMLA-covered purpose. *See* 29 CFR 825.208(b)(1). The regulations prohibit

FMLA-qualifying and the specific notice required to be provided by employers are essential means by which employees learn of their FMLA rights and obligations. Several employers provided information on this topic.

With regard to the notice procedures employers actually use, one commenter stated that its notification procedures are “working quite well,” because it includes FMLA information during new employee orientation and has trained its supervisory workforce to recognize potential covered absences. FNG Human Resources, Doc. FL13, at 4. It stated that supervisors notify the personnel office, which mails out contingent FMLA notices and certification paperwork with instructions on how to have it completed, and the notice includes a statement of all employee rights and responsibilities. This employer allows employees 20 days to return the certification forms (more than the required 15 days), in order to cover mailing time and because some medical providers have a slow completion rate. Once the paperwork is received, “we keep both the employee and supervisory personnel abreast of updates and approvals.” *Id.*

The Pennsylvania Turnpike Commission stated that its “process works great for our company and everyone is kept abreast of their FMLA status.” The Pennsylvania Turnpike Commission, Doc. 10092A, at 5–6. It described that when it receives a certification form, employees are sent a letter stating whether the leave is approved or denied, with a starting date and expiration date if approved. It reminds the employee’s supervisor a week prior to the expiration date, who

employers from retroactively designating leave as FMLA if they could have properly determined the status of the leave at the time the employee either requested or commenced the leave. *See* 29 CFR 825.208(c); *but see supra* Chapter II (discussing status of penalty provision of section 825.208(c) in light of the Supreme Court’s decision in *Ragsdale*). The regulations do allow for retroactive designation, however, if the employer learns after an employee’s leave has begun that the leave is for an FMLA-covered purpose. *See* 29 CFR 825.208(d). Similarly, if an employer knows the reason for the leave but is unsure whether it qualifies for FMLA protection, or if the employer has requested but not yet received certification of the need for leave, the employer may preliminarily designate the leave as FMLA-covered. *See* 29 CFR 825.208(e)(2). If upon receipt of the requested information the employer determines that the leave is FMLA protected, the preliminary designation becomes final. *Id.* If the additional information does not confirm that the absence was for an FMLA-covered reason, the employer must withdraw the preliminary designation and notify the employee. *Id.* Finally, if the employer does not learn that leave was taken for an FMLA-covered purpose until the employee returns from leave, the employer may, within two business days of the employee’s return, designate the leave retroactively as covered by the FMLA. *See* 29 CFR 825.208(e)(1).

reminds the employee that the leave is expiring. If the employee needs additional leave, the employee recertifies.

The Ohio Department of Administrative Services similarly noted that it understands that an employee's awareness of FMLA rights and responsibilities "is critical to fulfilling the goals of the statute," and therefore employees are given notice of the State's FMLA policy upon their hire and notices also are posted. Doc. 10205A, at 4. The State also notifies employees of their rights verbally within two days of designating leave as FMLA leave, and confirms the designation in writing by the following payday. Employees receive notice the first time they are granted FMLA leave in each six-month period. The State noted that sending a letter to employees with chronic conditions every time they request FMLA leave for such a condition could "serve as an additional opportunity for communication," but it believes that such notice would be very burdensome. *Id.* at 5. The State also supported eliminating the requirement to notify employees that their leave will be counted as FMLA leave when an employee has requested FMLA leave in writing or a verbal request has been appropriately documented. *See id.*

One commenter stated that it also advises employees verbally that their leave is FMLA-qualifying and then follows up with a letter. "If they have already used some FMLA in the last 12 months, I will include in the letter the amount of leave still available to them. In the case of intermittent leave I will carefully explain our rolling 12 month period and give them a copy of the attendance controller on which I recorded their leave and, again, carefully explain that on the anniversary date of time used, that amount will become available for them to use." Elaine G. Howell, H.R. Specialist, International Auto Processing, Inc., Doc. 4752, at 1.

Another commenter stated that it notifies employees that their leave has been designated as FMLA leave by sending the employees a letter confirming that their rights under the FMLA have been reviewed and the leave conditionally designated, pending proper doctor certification. Franklin County Human Resources Department, Doc. FL59, at 7. The University of Washington noted that it mails a written notification to eligible employees after a health-related three-day absence. *See* University of Washington, Doc. FL17, at 2-3.

The National Coalition to Protect Family Leave stated that many of its

members follow the regulations for designating leave at sections 825.301(b) (specific notice of rights and responsibilities) and 825.208(b)(2) (payroll stub or other written designation). However, it stated that some employers are not aware of both provisions, and that the designation process is confusing when an employer provisionally designates leave when the employer does not have sufficient information to make a final determination within two days. The Coalition suggested that the regulations should allow the "official 'designation' notice to be sent to employees after sufficient information is received from the employee to make a determination whether the leave qualifies for FMLA protections as part of the section 825.301 notice obligations (rights and responsibilities requirement). No further designation should be required. Employers should simply have the obligation to provide the employees with FMLA usage information on request[.]" National Coalition to Protect Family Leave, Doc. 10172A, at 42.

One commenter suggested, as a possible improvement that would allow employees to receive more accurate information on their FMLA leave balances, that employees should keep their own records and also ask "the employer for a copy of their FMLA records and report any discrepancies within a specified amount of time to be resolved." Bendix Commercial Vehicle Systems LLC, Doc. 10079A, at 9. Another commenter similarly suggested that employers should be required "to make a good faith effort to provide employees with information about their eligibility status and FMLA leave balances within a reasonable amount of time, upon request by an employee[.]" but employees also should be required to track their own hours and notify the employer if they dispute the employer's data. Spencer Fane Britt & Brown LLP, Doc. 10133C, at 43. This commenter contended that an employee's FMLA rights should be "no greater than they would otherwise be if the employer either fails to provide the information or inadvertently provides inaccurate information." *Id.*

E. Timing Issues

The Request for Information sought comments on whether the two day time frame for employers to notify employees that their request for FMLA leave has been approved or denied was adequate.

The majority of comments on this topic indicated that the current two-day time frame was too restrictive. *See, e.g.,* United Parcel Service, Doc. 10276A, at 10 ("In most cases, the initial

notification of an absence or need for leave is received by front-line management, who conveys the information up the chain of command and to the local HR representative, who notifies the FMLA administrator, who is ultimately responsible for making a determination. It is not unusual for it to take one to two business days just for the right personnel to receive the information, much less make a determination and communicate it back to the employee."); Courier Corporation, Doc. 10018A, at 4 ("The two-day timeframe is way too short for notifying employees about their leave request, since as employers we are often chasing information from the employee or physician."); Spencer Fane Britt & Browne LLP, Doc. 10133C, at 42 ("For most employers, this is virtually impossible. Although most employers designate leave within a reasonable time frame, it is usually well outside the two-day time frame, thus creating a risk that the designation will be ineffective."). Employers suggested varying timeframes to replace the two-day limit. *See, e.g.,* Fisher & Phillips LLP, Doc. 10262A, at 15 (fifteen days from receipt of a certification form); National Coalition to Protect Family Leave, Doc. 10172A, at 48 (ten business days); Association of Corporate Counsel, Doc. FL31, at 11 (five working days); Courier Corporation, Doc. 10018A, at 4 (five days); United States Postal Service, Doc. 10184A, at 5 (same); Northrop Grumman Newport News Shipbuilding and Dry Dock Company, Doc. FL92, at 3 (same); Spencer Fane Britt & Browne LLP, Doc. 10133, at 42 (suggesting a reasonableness standard).

One employer stated that while some decisions can be made in two days, even a week might not be sufficient in other cases, depending upon the amount of information supplied by an employee and whether clarification is needed from the health care provider. *See* Elaine G. Howell, H.R. Specialist, International Auto Processing, Inc., Doc. 4752, at 1. Other commenters similarly stated that the two-day time frame for providing notification to employees that FMLA leave has been approved or denied is inadequate, "as there are many factors which result in delays in both obtaining information and processing requests." Hinshaw & Culbertson LLP, Doc. 10075A, at 5.

With regard to possible alternative requirements, Jackson Lewis suggested employers should not be required to designate absences as FMLA-qualifying within two days, "as long as the employee is receiving the protections of the FMLA[.]" and that a regulation could allow employers to preliminarily

designate absences as FMLA-qualifying, subject to the “employees “opting out” of FMLA leave” or the employer establishing that the condition does not qualify. Doc. FL71, at 8. The commenter stated this “would bring greater certainty and closure to absence management for absences by imposing a periodic “employee-employer” reconciliation of FMLA leave.” *Id.* at 9. Alternatively, Jackson Lewis suggested that a regulation could “require that employers advise employees in general notices that they must specifically request FMLA leave for all absences of less than one week in duration,” and that employers should be allowed “to designate retroactively absences that initially were not classified by either the employer or employee as FMLA but would, in retrospect, qualify as intermittent leave under the FMLA.” *Id.* See also Fairfax County Public Schools, Doc. 10134A, at 3–4 (in order to focus on the outcome [12 weeks of leave] rather than the application process, employers could be required to notify employees annually that, if they have one year of service and 1,250 hours, they are entitled to FMLA leave and then the burden should be on employees to contact the designated official to apply).

Another commenter suggested that, because employers experience problems with giving proper notice when employees do not provide prompt and proper notice of their need for leave, “DOL should implement detailed regulations which provide necessary language or actions that must be taken by employees to put their employers on notice of their intent to take FMLA leave. As a result, employers will be significantly better equipped to execute their responsibilities under the Act, including, but not limited to notifying employees that the leave in question will count as FMLA leave.” Williams Mullen, Doc. FL124, at 2. See also Miles & Stockbridge, P.C., Doc. FL79, at 5 (designation difficulties could be eliminated by requiring employees “to request the leave be designated as FMLA leave in writing” either prior to or within three days of the absence); Betsy Sawyers, Director, Human Resources Department, Pierce County, Washington, Doc. FL97, at 4 (responsibility for requesting FMLA leave should be shifted to employee so employer does not have to “second guess or request additional explanation from the employee” or, alternatively, broaden an employer’s ability to retroactively designate FMLA leave to include entire period of leave). Another commenter noted that it would like the

regulations to provide further guidance on making retroactive FMLA designations when an employee has initial absences that do not qualify for FMLA leave, but the health condition develops over a period of time. City of Eugene Human Resource & Risk Services, Doc. 10069A, at 1.

Another commenter emphasized the hardships employees suffer when they do not know promptly whether the employer believes they are entitled to protected leave. The commenter stated that companies do not respond within the required two business days, so employees either do not take the time off that they (or their family members) need, or else they take off but are afraid because they do not know whether they will be subject to discipline for being off work. Frasier, Frasier & Hickman, LLP, Doc. FL60, at 1–3. The commenter gave an example of an employee who was not advised of his FMLA leave status until approximately 60 days after he submitted a certification form. This commenter suggested finding some means of making employers respond timely to requests for leave. Similarly, the International Association of Machinists and Aerospace Workers suggested that employers should be “required to promptly inform workers when they are using their FMLA leave, and to provide copies of FMLA leave balances,” rather than putting this burden on employees, because employees can be confused as to which days their employer has counted as FMLA leave and which it has not. Doc. 10269A, at 3. See also 9to5, National Association of Working Women, Doc. 10210A, at 3 (same).

One commenter noted that “[m]istakes about an employee’s eligibility under the FMLA can be costly for both employers and employees. Certainty in this area is critical.” National Multi Housing Council and National Apartment Association, Doc. 10219A, at 2. However, other comments indicate that certainty may be difficult to achieve promptly. For example, the Ohio Department of Administrative Services noted that, because the 1,250 hours of work test involves distinguishing between active work and paid time off, such as vacation time, sick leave, bereavement leave, holidays, personal leave, etc., “eligibility determinations continue to bring confusion to employers and their managers. In light of the difficult fact patterns that oftentimes accompany eligibility determinations, the State of Ohio recommends that the Department implement a “safe harbor” provision to exempt employers from penalties when employers follow the regulatory

requirements and make a good faith eligibility determination that is later overturned by a court or other authoritative body.” Ohio Department of Administrative Services, Doc. 10205A, at 1. (Penalties arising from an employer’s failure to follow the regulatory requirements concerning notice are addressed in Chapter II of the Report.)

AVAYA Communication similarly noted that calculating the 1,250 hours of work is a time consuming process for employers, and that “it is difficult to obtain an accurate number of hours worked in time for the notification letter to go out promptly.” Doc. FL33, at 1. Therefore, the commenter recommended allowing employers a grace period within which to determine whether employees are eligible for leave. Another commenter believed that employers should simply have to advise an employee who does not have the requisite 1,250 hours of service of that conclusion, and the employer should not be required to advise the employee when s/he will be eligible for FMLA leave because that timing is difficult to predict. Pilchak Cohen & Tice, P.C., Doc. 10155A, at 5. See also United Parcel Service, Doc. 10276A, at 7–8 (objecting to any revision to the regulations that would require “employers to provide periodic or on-demand updates about the amount of FMLA leave remaining to employees”).

On the other hand, another commenter noted that it uses a tracking program related to its payroll system that tells it whether “the employee has been employed one year, worked 1250 hours in the prior twelve months, and the number of weeks they are eligible [based on] any previous leaves associated with FMLA. A notice is sent to the employee within 48 hours of their request.” AM General LLC, Doc. 10073A, at 2. Another employer similarly stated that it determines whether employees are eligible by running a report through the payroll system to track the number of hours worked in the past 12 months, but then spends “an unusual amount of time” determining how much FMLA leave the employee already has used. Elaine G. Howell, H.R. Specialist, International Auto Processing, Inc., Doc. 4752, at 1.

One law firm suggested that the Department’s regulations may be the cause of employer confusion over their notice responsibilities. “The Regulations include several notice obligations, which we believe are not all necessary and have simply created more FMLA paperwork than is really necessary.” Spencer Fane Britt & Browne LLP, Doc. 10133C at 41. “The

Regulations do not include in one provision all of the applicable time frames and when they apply. Employers struggle over provisions requiring preliminary designations, final designations, when designations can be made retroactively, whether to designate leave as FMLA leave when an incomplete certification is returned, and when the "two-day" designation rule applies." *Id.* at 41–42.

Finally, 53 Democratic Members of Congress recognized the potential for confusion concerning employer notice obligations.

The Department mentions a few of the notice issues that have arisen under the FMLA. While it is true that the statute is not perfectly clear in elaborating the notice obligations of employees and employers under the FMLA, it is not clear that the Department can fully resolve the issues through revisions in regulation alone. It would be helpful for the Department to ask Congress to clarify how the notice motions of the Act apply. The law or the regulations should put forth a clear and commonsense regime by which employers would notify workers of their rights and responsibilities under the Act, workers would be required to notify their employers of their need to take FMLA leave, and employers would be required to notify workers of their approval or denial of FMLA leave as well as the term of any approval or reasons for any denial and appeal rights. Clearer notice requirements would also resolve any issues related to the "duration" of leave.

Letter from 53 Democratic Members of Congress, Doc. FL184 at 3.

On the other hand, a few commenters indicated that the two-day time frame is adequate. One commenter stated that the "two-day rule is not an issue when you are aware of a possible FMLA event on the first day of eligibility[,] because the contingent notice can be mailed or handed to the employee immediately, but problems arise when the possible FMLA coverage is not known until later, such as when the employee returns to work. FNG Human Resources, Doc. FL13, at 5. However, this employer allows the employee to apply at that time and gives them the paperwork immediately. The National Partnership for Women & Families noted the current data does not support an increase in the time period beyond the two days provided. *See* National Partnership for Women & Families, Doc. 10204A, at 21 ("Most organizations spend only between thirty and 120 minutes of administrative time per FMLA leave episode to provide notice, determine eligibility, request and review documentation, and request a second opinion. Therefore, no change to the current two-day rule response requirement is warranted.") (footnote

omitted). Notably, Unum Group, a provider of Federal and state FMLA administration services, stated that "[t]he two-day timeframe for providing notice to an employee of his/her eligibility for FMLA leave is sufficient." *See* Doc. 10008A, at 3. At the end of 2006, Unum Group reported having 95 customers located throughout all 50 states and administering leaves for a total employee population of 585,157. *Id.* at 1.

VI. The Medical Certification and Verification Process

The Department asked several questions in the Request for Information regarding the medical certification and verification process. This chapter addresses the Department's request for comments on the following issues: whether the regulatory restriction in section 825.307(a) that permits an employer to contact the employee's health care provider for purposes of clarification and authentication only through the employer's health care provider results in unnecessary expense or delay and what are the benefits of the restriction; whether the optional model certification form (WH-380) seeks the appropriate information and how it could be improved; whether the general 30-day period for recertification set forth in section 825.308 is an appropriate time frame; whether second opinions should be allowed on recertifications; and whether employers should be allowed to request a fitness for duty certification for an employee returning from intermittent leave. This chapter also addresses other comments received regarding the medical certification process including comments related to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. L. 104–191, a law that was discussed in Request for Information but was not directly referenced in any specific questions.

A. Statutory and Regulatory Provisions Regarding Medical Certification and Verification

The medical certification process implicates several statutory and regulatory provisions under the FMLA. While the Act does not require employers to obtain medical certification in support of an employee's request for leave, if an employer chooses to do so, it is limited in what medical information it may seek as well as the process it must go through to obtain that information.

1. Statutory Provisions Regarding the Medical Certification and Verification Process

Employers have the option of requiring employees who request leave due to their own serious health condition or to care for a covered family member with a serious health condition to support their need for leave with a certification issued by their (or their family member's) health care provider. *See* 29 U.S.C. 2613(a).¹³ The information necessary for a sufficient certification is set forth in section 103 of the Act. *See* 29 U.S.C. 2613(b). The statute states that a medical certification "shall be sufficient" if it states the following: the date the condition commenced; the probable duration of the condition; "appropriate medical facts" regarding the condition; a statement that the employee is needed to care for a covered family member or a statement that the employee is unable to perform the functions of his/her position (as applicable); dates and duration of any planned treatment; and a statement of the medical necessity for intermittent leave and expected duration of such leave. *Id.*

In cases in which the employer has reason to doubt the validity of the certification provided by the employee, the statute allows the employer to require the employee to obtain a second opinion from a health care provider of the employer's choice and at the employer's expense. *See* 29 U.S.C. 2613(c). Where the first and second opinions differ, the employer may require the employee to obtain a binding third opinion from a health care provider selected jointly by the employer and employee (and paid for by the employer). *See* 29 U.S.C. 2613(d). Finally, the statute allows the employer to require the employee to provide subsequent recertifications from the employee's health care provider on a reasonable basis. *See* 29 U.S.C. 2613(e).

In addition to the certification of the need for leave due to the employee's or a covered family member's serious health condition, the statute also allows employers to require certification of the employee's ability to return to work following leave for his or her own serious health condition as a precondition to job restoration under certain circumstances. *See* 29 U.S.C. 2614(a)(4). An employer's request for a return-to-work certification must be pursuant to a uniformly applied practice or policy. *Id.* Where an employee's

¹³ The certification provision does not apply to requests for leave to care for a healthy newborn or newly placed child under 29 U.S.C. 2612(a)(1)(A) and (B).

return to work is governed by the terms of a collective bargaining agreement or State or local law, however, the FMLA does not supersede those procedures. *Id.*

2. Regulatory Provisions Regarding the Medical Certification and Verification Process

The regulations flesh out the procedures employers must follow when utilizing the tools provided them in the Act for verifying an employee's need for FMLA leave. In general, sections 825.305 and 825.306 address the initial medical certification, section 825.307 sets forth the employer's options for verifying the information in the initial certification, section 825.308 details the employer's right to seek subsequent recertification, and sections 825.309 and 825.310 address the employer's ability to require certification of the employee's ability to return to work following FMLA leave due to their own serious health condition.

Section 825.305 requires an employer to notify the employee in writing if the employer is going to require medical certification for the leave (subsequent requests for recertification may be oral). *See* 29 CFR 825.305(a). Section 825.305 also sets forth the general rule that employers must allow employees at least 15 calendar days to provide the certification and that, where time allows, employees should provide the certification prior to the commencement of foreseeable leave. *See* 29 CFR 825.305(b). While employers are generally expected to inform employees that certification will be required at the time the leave is requested or, if the leave is unforeseen, within two business days of the leave commencing, employers may request certification at a later time if they have reason to question the appropriateness or duration of the leave. *See* 29 CFR 825.305(c). Employers are required to inform employees of the consequences of not providing the requested certification and to advise the employee if the certification is incomplete and allow an opportunity for the employee to cure any deficiency. *See* 29 CFR 825.305(d). If the employer's sick leave plan's certification requirements are less stringent and the employee or the employer exercises the option to substitute paid sick leave for unpaid FMLA leave, the employer may only require compliance with the less stringent certification requirements of the paid leave plan. *See* 29 CFR 825.305(e).

Section 825.306 of the regulations sets forth the information required for a complete certification, which may be

provided on the Department's optional WH-380 form or any other form containing the same information. *See* 29 CFR 825.306. Section 307 governs the employer's ability to seek clarification and authentication of, and a second and/or third opinion on, the employee's medical certification. *See* 29 CFR 825.307. This section makes clear that an employer may not require information beyond that set forth in section 306, but that the employer's health care provider may seek clarification or authentication of the information in the certification from the employee's health care provider with the employee's permission. *See* 29 CFR 825.307(a). Section 307 also makes clear that where an employee's FMLA leave is also covered by workers' compensation, the employer may follow the workers' compensation procedures if they allow for direct contact with the employee's health care provider. *See* 29 CFR 825.307(a)(1). If the employer has reason to question the validity of the certification, the employer may require the employee to obtain a second opinion at the employer's expense and with a health care provider selected by the employer. *See* 29 CFR 825.307(a)(2). If the second opinion conflicts with the employee's original certification, the employer may require the employee to obtain a binding third opinion at the employer's expense from a health care provider selected jointly by the employer and the employee. *See* 29 CFR 825.307(c). If it is ultimately determined as a result of the second and/or third opinion process that the employee is not entitled to FMLA-protected leave, the leave shall not be designated as FMLA-covered and the employer may treat the leave under its established policies. *See* 29 CFR 825.307(a)(2).

Section 308 of the regulations sets forth the conditions under which an employer may request recertification of the employee's (or covered family member's) serious health condition. *See* 29 CFR 825.308. Generally, employers may not request recertification more often than once every 30 days and only in connection with an absence. Where the initial certification indicates a minimum period of incapacity in excess of 30 days, recertification may not be requested until the initial period of incapacity indicated has passed. *See* 29 CFR 825.308(b)(1). In all instances, employers are allowed to request recertification if there is a significant change in circumstances regarding the leave or if the employer receives information that casts doubt on the employee's stated reason for the absence. *See* 29 CFR 825.308(a)-(c).

Employers must allow employees at least 15 days to provide recertification. *See* 29 CFR 825.308(d). Recertifications are at the employee's expense and completed by the employee's health care practitioner. Employers are not permitted to request second opinions on recertifications. *See* 29 CFR 825.308(e).

Finally, sections 825.309 and 825.310 of the regulations govern requirements for the employee's return to work. Employers may require employees to report periodically on their intention to return to work. *See* 29 CFR 825.309(a). If an employee states an unequivocal intention not to return to work the employer's obligations under the FMLA cease. *See* 29 CFR 825.309(b). Where an employee needs more or less leave than originally requested, the employer may require the employee to provide notice of the changed circumstances within two business days where foreseeable. *See* 29 CFR 825.309(c). Employers may have a uniformly applied policy of requiring similarly situated employees who take leave for their own serious health condition to submit certification of their ability to return to work. *See* 29 CFR 825.310(a). Such certification need only be a simple statement of the employee's ability to work. *See* 29 CFR 825.310(c). The employer's health care provider may contact the employee's health care provider, with the employee's permission, to clarify the return-to-work certification but may not request additional information and may not delay the employee's return to work. *Id.* The employee bears the cost of providing the return to work certification. *See* 29 CFR 825.310(d). Where state or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall apply. *See* 29 CFR 825.310(b). Employers are required to provide employees with advance notice of the requirement to provide a return-to-work certification. *See* 29 CFR 825.310(e). Where an employee has been given appropriate notice of the requirement to provide a return-to-work certification, the employee's return from leave may be delayed until the certification is provided. *See* 29 CFR 825.310(f). Return-to-work certifications may not be required for employees taking intermittent leave. *See* 29 CFR 825.310(g). Employers may not require a second opinion on return-to-work certifications. *See* 29 CFR 825.310(e).

B. Comments Regarding the Medical Certification and Verification Process

1. Medical Certification Process

Both employers and employees expressed frustration with the medical

certification process. As discussed below, employers generally expressed frustration with their ability to obtain complete and clear certifications. Employees expressed frustration with employers determining that a certification is incomplete but not informing the employee what additional information is necessary to satisfy the employer's concerns. Some commenters noted that these repeated requests for additional information are causing tension in the doctor/patient relationship. Overall, the comments make clear that the certification process is a significant source of friction between employees and employers: The two groups, however, attribute the source of the friction to very different causes.

a. Complete Certifications

Multiple employers commented that a complete certification should require not just that the certification form is filled-out, but that meaningful responses are given to the questions. *See, e.g.*, Jackson Lewis LLP, Doc. FL71, at 5 (“The rule prohibiting employers from asking any additional information once an employee submits a completed medical certification ignores the reality that a technically ‘completed’ certification may offer little insight into the need for FMLA leave, much less the medical necessity for leave on an intermittent basis.”); National Coalition to Protect Family Leave, Doc. 10172A, at 47 (“If health care providers * * * do not provide direct responses to the questions, the regulations should be modified to specify that the certification is not considered ‘complete’ for purposes of the employee’s certification obligations, thereby not qualifying the employee for FMLA leave.”); South Central Human Resource Management Association, Doc. 10136, at 11 (“We recommend the Regulations make clear that a ‘complete’ certification is required, that meaningful answers have to be furnished for all questions, and that a certification is ‘incomplete’ if a doctor provides ‘unknown’ or ‘as needed’ to any question.”). A commenter who had represented several employees in FMLA suits disagreed, however, stating that “in order to avoid protracted litigation over these issues, once completed and signed by a physician, the model certification form should be considered final and binding.” Kennedy Reeve & Knoll, Doc. 4763A, at 14.

Commenters’ frustration with vague and nonspecific responses on certifications was greatest in regard to certifications for intermittent leave due to chronic conditions. *See, e.g.*, Federal

Reserve Bank of Chicago, Doc. FL56, at 2 (“We often see health care providers list the duration of an employee’s chronic condition as ‘indefinite’ or ‘lifetime’ and indicate that the frequency of the episodes of incapacity as ‘unknown.’ This makes it very difficult to manage employee attendance.”); City of Portland, Doc. 10161A, at 2 (“The certifications, particularly for chronic conditions, are often so vague as to be useless.”); South Central Human Resource Management Association, Doc. 10136, at 11 (“If a doctor cannot venture an estimate as to how often an employee will have a true medical need to be absent, we question whether the doctor is competent to evaluate the condition.”); Society for Human Resource Management, Doc. 10154A, at 8 (“Notations such as ‘lifetime,’ ‘as needed,’ or other similarly vague statements ought not suffice. Health care providers in particular should be required to provide as much detail as possible on the total amount of intermittent leave that is needed or allow employers to deny the leave.”). The American Academy of Family Physicians, however, noted that such responses are appropriate in some circumstances:

Intermittent leave is problematic for the certifying physician and employer. Employers have noted that with respect to the frequency of the episode of incapacity, the physician might write “unknown.” Employers argue that this leaves them in the difficult position of guessing about the employee’s regular attendance. However, the frequency of incapacity in chronic conditions such as migraine headaches is not predictable, making “unknown” the appropriate answer to the question. * * * It is worth noting that despite medical advances, absolute cures do not exist for all conditions making the duration of these conditions “indefinite” or “lifetime” from the current medical perspective.

American Academy of Family Physicians, Doc. FL25, at 2–3. Other commenters echoed the point that specific estimates of the frequency and duration of intermittent leave due to the flare-up of a chronic condition cannot always be made. *See, e.g.*, An Employee Comment, Doc. 4668, at 1 (“The Doctor should simply state that the person has a covered condition and how long the person will need to take time off and when, if known. If unknown the Doctor should be able to say just that.”); Association of Professional Flight Attendants, Doc. 10056A, at 10 (recounting employee’s sending over 25 pages of medical documentation in an effort to satisfy employer’s questions regarding frequency and duration of need for leave due to chronic conditions); Mark Blick DO, Rene

Darveaux MD, Eric Reiner MD, Susan R. Manuel PA–C, Doc. FL292, at 1 (“The form also asks us to estimate how often a patient may need to miss work and then wants patient to fill a new form if they miss more than we estimate. Unfortunately, we in health care do not have a crystal ball to know the precise number of days patients may miss.”). As the Communication Workers of America noted, when it comes to the frequency and duration of leave due to a chronic condition employers are searching for certainty in response to a question which asks the health care provider for an estimate. Doc. R346A, at 10 (“The current certification form recommended by DOL makes it clear that the doctor is being asked to estimate the likely frequency and duration of any absences (‘probable duration’ ‘likely duration and frequency’), yet many employers seem to expect a definitive prediction and deny leaves that exceed the estimates provided on the original certification form.”).

b. Incomplete Certifications

Multiple commenters also expressed frustration with what they perceived to be the open-ended nature of the certification process and sought clarification of how many opportunities an employee must be provided to cure a defective certification. *See, e.g.*, Waste Management, Inc., Doc. 10240A, at 2 (“The current regulation is open to interpretation regarding when information is due and how much additional time should be afforded to employees who do not share the FMLA certification forms timely.”); Ken Lawrence, Doc. 5228, at 1 (“At the present time the employee is really not limited to any particular time (could be months) if they are making ‘good faith’ efforts to obtain the certification.”); Federal Reserve Bank of Chicago, Doc. FL56, at 2 (“There should be an absolute cut off when an employer can require the employee to submit a completed certification form and the consequence of not meeting that deadline is that the absence(s) is not covered by the FMLA.”); Society for Human Resource Management, Doc. 10154A, at 18 (“HR professionals often have difficulty in determining how many times an employer must give an employee an opportunity to ‘cure’ a deficiency, and how long to allow them to provide such a complete certification.”). Commenters also sought clarification regarding the consequences to the employee if leave is taken during the certification process but a complete and sufficient certification is not ultimately provided.

Delaying a leave for the tardy return of a completed certification is meaningless because by the time the delayed certification has been returned, the employee has likely already taken leave (perhaps for weeks) and the employer can only revoke the FMLA designation for time already taken. The situation is exacerbated because the employer cannot reduce any of the employee's FMLA balance despite the fact the employee was absent. As a result, the employee is rewarded by having the opportunity to take more than 12 weeks of leave in that given year. While the employer technically could terminate or discipline the employee for this non-FMLA time already taken, in all likelihood employers would be concerned that such an action would run afoul of the law's sweeping prohibitions from interfering with, restraining or denying an employee's leave.

Hewitt Associates, Doc. 10135A, at 19; *see also* United Parcel Service, Doc. 10276A, at 11 ("The remedy specified in the regulations for an employee's failure to provide adequate notice is to deny or delay the employee's leave, but in these cases, leave has already been taken."); Foley & Lardner LLP, Doc. 10129A, at 4 ("The provision does not explain how long the delay may last or what the consequences of a 'delay' can be."); Sherman & Howard L.L.C., Doc. 10252A, at 1 ("The regulations should make clear that if an employee does not ultimately qualify for FMLA leave, or fails to provide medical certification to support the requested leave, the employee's absence will be unprotected. This means that the employer may appropriately enforce its attendance policy which may result in disciplinary action being taken against the employee.").

c. Employer Requests for Additional Information

Employee commenters expressed related frustrations with the certification process. In particular, several commenters stated that employers repeatedly reject certifications as incomplete without specifying what additional information is necessary, leading to a prolonged and frustrating back-and-forth process. *See, e.g.*, International Association of Machinists and Aerospace Workers, Doc. 10269A, at 4 ("We have many members who have their doctors fill out the paperwork only to be told it is not properly filled out. The employee fixes that problem and the Company tells them there is another problem with the paperwork. This occurs over and over until finally the doctor or the employee, or both give up."); Association of Professional Flight Attendants, Doc. 10056A, at 18 ("[I]t is simply unfair to send FMLA leave requests back to the

employees and their treating health care providers for more medical facts, without ever indicating what kinds of additional medical facts are required before the employer will make a determination of medical eligibility or medical ineligibility."). The commenters noted that these repeated requests for additional information force the employee to make additional visits to his or her health care provider (resulting in additional missed work and expense) and discourage the employee from pursuing FMLA protection. *See, e.g.*, Association of Professional Flight Attendants, Doc. 10056A, at 12 ("[T]he Company's decision to challenge somewhat routinely the health care provider's estimate of frequency and duration imposes substantial burdens on the employee—both in terms of the cost of a second or third visit to the doctor's office, and in terms of the time required to complete what is becoming a paperwork nightmare."); An Employee Comment, Doc. 4395, at 1 (recounting her personal experience with repeated employer requests for additional information regarding her daughter's medical condition); An Employee Comment, Doc. 4668, at 1 ("It should not be up to the employer to nitpick a request for FMLA coverage.").¹⁴ Commenters noted that repeated requests for additional information were creating tension between employees and their health care providers. *See* International Association of Machinists and Aerospace Workers, Doc. 10269A, at 4 ("Some doctors refuse to fill out the exact same paperwork every 30 days, particularly for life-long chronic conditions like colitis or migraines."); Kennedy Reeve & Knoll, Doc. 4763A, at 15 ("I have been hearing more and more stories of doctors refusing to fill out the forms, thereby leaving the employee without recourse."); Lucy Walsh, Director, Human Resources, Providence Health Ministry, Doc. 10064A, at 1–2 ("Some physicians have absolutely refused to deal with the forms at all which leaves both the employee and employer in a dilemma."); Coalition of Labor Union Women, R352A, at 5 ("Many doctors are refusing to complete duplicative paperwork, resulting in leave denials that must be either

¹⁴ Several commenters also expressed concern that health care providers are charging employees to complete the certification form (and, in some cases, to respond to employer requests for clarification). *See, e.g.*, Sun Microsystems, Inc., Doc. 10070A, at 2 (reporting that their employees have been charged between \$25 and \$200 to fill out a medical certification); FNG Human Resources, Doc. FL13, at 3–4 (employees charged up to \$50 for certification); Shelly Johnson, Oklahoma State University, Doc. 5185, at 1 (same).

appealed or pursued through the contract's grievance procedures.").

Some commenters viewed repeated employer requests for additional medical information as an inappropriate attempt by the employer to substitute its determination of the seriousness of the employee's health condition for the employee's health care provider's judgment. *See* Coalition of Labor Union Women, Doc. R352A, at 4 ("We have heard disturbing reports from our members that many employers are often 'second-guessing' the diagnoses of workers' doctors and other health care providers by insisting on additional certifications or challenging intermittent leave requests if the doctor's estimate of the likely time needed is exceeded even by one or two days or in some minor respect. We believe that DOL should issue a strong reminder that employers are obligated to utilize the second opinion process established in the regulations."); Communications Workers of America, Doc. R346A, at 7 ("In CWA's experience, many employers evidence their distaste for FMLA leaves by needlessly quarreling with the information provided by health care providers in support of the employee's request for leave or 'second-guessing' the doctor under the guise of 'clarifying' the information provided on the form."); Association of Professional Flight Attendants, Doc. 10056A, at 15 (identifying "employer's rejection of [FMLA] applications based on its medical staff's disagreement with the health care provider's estimate of duration and frequency, or treatment plan, without invoking the second doctor review" as one of three primary concerns with medical certification process).

Not all commenters, however, felt the current certification process needed to be revised. One commenter noted that the current certification process works well in its workplace.

We have trained our supervisory workforce to recognize even the slightest possibility of a covered absence. The supervisory personnel notify H.R. to mail out contingent FMLA notice and we include Certification paperwork with instructions on how to have it completed. We immediately place the employee on possible FMLA pending the receipt of certification paperwork. The notice covers all provisions of FMLA and necessary steps to rights and responsibilities. We actually give the employees 20 days to return the certification to cover the mailing time and some providers' slow completion rate. Once all certification paperwork is received we keep both the employee and supervisory personnel abreast of updates and approvals.

FNG Human Resources, Doc. FL13, at 4; *see also* Legal Aid Society—Employment Law Center, Doc. 10199A,

at 3 (“It is the [certification procedure] that establishes the objective basis for leave based upon the informed opinion of the health care provider of the employee or family member. Despite this useful, practical, and commonsense system that was designed to evaluate whether any condition constitutes a ‘serious health condition,’ many employers refuse to use it or use it improperly.”). Several commenters suggested that there was no need to change the current certification procedure. *See, e.g.*, National Partnership for Women & Families, Doc. 10204A, at 19 (“The existing regulations appropriately balance a worker’s interest in a manageable certification process that does not impose unreasonable burdens, with the employer’s interest in the accurate certification of medical conditions.”); Faculty & Staff Federation of Community College of Philadelphia, Local 2026 of the American Federation of Teachers, Doc. 10242A, at 6 (same); Center for Law and Social Policy, Doc. 10053A, at 4 (same); OWL, The Voice of Midlife and Older Women, Doc. FL180, at 2 (opposing any change in certification rules).

2. Employer Contact With Employee’s Health Care Provider—Process and Privacy Concerns

Both employers and employees commented extensively on the subject of employer contact with the employee’s health care provider. Section 825.307(a) of the regulations requires that employers may contact the employee’s health care practitioner for clarification of the medical certification only with the employee’s consent and the contact must be made through a health care practitioner. The employer may not use the clarification process to request additional information beyond the information required in the initial certification. *See* 29 CFR 825.307(a). In general, employers were frustrated with the regulatory restrictions on contact with the employee’s health care provider and employees were concerned that any changes to the current process would impinge on their medical privacy.

a. Requirement That Employer Communicate Through a Health Care Provider

Many employers commented that the requirement that they communicate only through a health care practitioner resulted in significant cost and delay. *See, e.g.*, Milwaukee Transport Services, Inc., Doc. FL80, at 3 (“In 2006 alone, MTS spent \$23,000.00 for the services of a designated health care provider

because it was not itself permitted under the FMLA regulations to ask questions which that provider was then forced to ask on its behalf.”); City of Portland, Doc. 10161A, at 2 (“The Act requires employers to use the employee as an intermediary to communicate with doctors or incur substantial costs hiring additional doctors to consult with employee physicians or, in narrow circumstances, to give second and third opinions. Greater flexibility in obtaining information for medical certification would streamline FMLA approvals.”); Hewitt Associates, Doc. 10135A, at 15 (“The employer’s engagement of its own health care provider is expensive, takes additional time and ultimately delays the decision to approve or deny a leave request. Moreover, in cases when the employer simply wants clarification on the amount of time off required, it provides no true benefit to either the employer or the employee.”). The AFL-CIO, however, commented that “[a]ny expense caused by the requirement that employers use their own health care professional to contact the employee’s treatment provider, rather than making contact directly, is necessary to the preserve employee privacy.” Doc. R329A, at 42.

Some commenters suggested that employers’ expenses could be reduced by permitting registered nurses to contact the employee’s health care provider. *See, e.g.*, United Parcel Service, Doc. 10276A, at 8–9 (noting that even employers that have nurses on their staff are required to hire a health care provider to comply with section 825.307(a) of the regulations); MedStar Health, Inc., Doc. 10144A, at 16–17 (same); Manufacturers Alliance/MAPI, Doc. 10063A, at 7 (suggesting inclusion of RNs, LPNs, and physician’s assistants under the term “health care provider”); *see also* American Academy of Physician Assistants, Doc. 10004A, at 1 (suggesting that definition of health care provider in regulations should be broadened to include physician assistants). The Coalition of Labor Union Women, however, objected to broadening the definition of health care providers allowed to contact the employee’s treating physician, noting that its members “complain that employers use nurses or physician’s assistants who are not adequately trained and who repeatedly challenge their doctor’s diagnoses and predictions of leave duration and frequency, leading to the need for additional certifications and forcing the employee to take personal leave time to obtain new paperwork.” Coalition of Labor Union Women, Doc. R352A, at 6. Other

commenters suggested that their human resources professionals could more efficiently clarify the certification with the employee’s health care provider because they were both better versed in the FMLA and more familiar with the employee’s job duties and the work environment than the employer’s health care provider. *See, e.g.*, Association of Corporate Counsel, Doc. FL31, at 10 (“[T]he employer’s staff members—often its Human Resources employees—are usually more knowledgeable about the specific job requirements and other information that may be relevant or helpful to the employee’s health care provider in making his/her assessment.”); Milwaukee Transport Services, Inc., Doc. FL80 at 3–4 (same). One commenter, however, suggested that it was appropriate that medical inquiries be handled by medical professionals. *See* Unum Group, Doc. 10008A, at 3 (“The regulatory requirement that the employee’s health care provider be contacted only through the employer’s health care representative is beneficial in that it not only protects the privacy of employees but also ensures that medical information discussed and terminology used while clarifying and authenticating complete medical certifications are understood and correctly interpreted.”).

Employers also expressed frustration with the scope of information they could request when clarifying a medical certification. *See* Sally L. Burnell, Program Director, Indiana State Personnel Department, Doc. 10244C, at 6 (“The requirement to have another health care provider contact the submitting health care provider, and then only for clarification of the form, not for additional information, unnecessarily complicates and lengthens the approval process, often beyond the length of the absence itself.”); Jackson Lewis LLP, Doc. FL71, at 5 (“The rule prohibiting employers from asking for any additional information once an employee submits a completed medical certification ignores the reality that a technically ‘completed’ certification may offer little insight into the need for FMLA leave, much less the medical necessity for leave on an intermittent basis.”). Several employee commenters, however, asserted that employers are already using the clarification process improperly to seek additional information beyond that included in the certification form or even to challenge the employee’s health care provider’s medical judgment. *See* United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied

Industrial and Service Workers International Union, Doc. 10237A, at 4 (“It has been our experience that some employers contact the health care provider and attempt to reschedule appointments, ask questions that go beyond the certification of serious health condition at issue, or even try to get the health care provider to change the medical certification, all without employee consent.”); Communications Workers of America, Doc. R346A, at 10 (“In CWA’s experience, there is currently widespread non-compliance with the intent of the current regulation [29 CFR 825.307] limiting employer contact with employee health care providers to those circumstances where ‘clarification’ or ‘authentication’ are necessary.”).

b. Requirement of Employee Consent for Contact

Several commenters asserted that the requirement that an employer obtain employee consent prior to contacting the employee’s health care provider makes it extremely difficult for employers to investigate suspected fraud related to medical certifications. *See, e.g.*, Robert Haynes, HR-Compliance Supervisor, Pemco Aeroplex, Inc., Doc. 10100, at 1 (noting difficulty in investigating fraud when employee’s consent is necessary for the employer to authenticate form with employee’s health care provider); Ohio Public Employer Labor Relations Association, Doc. FL93, at 5–6 (same); United States Postal Service, Doc. 10184A, at 15 (suggesting that a “simple and fair way to remedy this problem is to allow an employer to make contact with the provider for the purpose of confirming authenticity”); Taft, Stettinius & Hollister LLP, Doc. FL107, at 6 (“Where authenticity is suspect, the employer’s inquiry is not medically related but rather, is intended to determine whether the employee’s health care provider issued the certificate and that it has not been altered. In such circumstances, the restrictions contained in Section 825.307(a) serve no useful purpose, impose unnecessary expense on employers, and are not justified by any language in the Act.”). Honda suggested that the regulations should distinguish between contacts by the employer to confirm administrative details and contacts related to substantive medical discussions: “[T]he FMLA Regulations should be amended to permit the employer to contact the employee’s health care provider’s office to confirm date, time and place of appointments, but not permit the employer to discuss the medical facts, the need for leave and

the frequency and duration of leave with the employee’s health care provider.” Honda, Doc. 10255A, at 11–12. Other commenters suggested that the process for seeking medical information under the FMLA should be consistent with the procedure set forth under the Americans with Disabilities Act. *See infra* Chapter VII.

c. Employee Privacy Concerns

Finally, many commenters expressed concern that any changes to the regulations governing contact between their employers and their health care providers would compromise their right to medical privacy. *See, e.g.*, An Employee Comment, Doc. 4019, at 1 (“I also oppose any regulatory changes that would allow employers to directly contact a worker’s health care provider, which unnecessarily violates the worker’s right to keep medical information confidential.”); 9to5, National Association of Working Women, Doc. 10210A, at 4 (“We also oppose any regulatory changes that would allow employers to directly contact a worker’s health care provider, which unnecessarily violates the worker’s right to keep medical information confidential.”); Faculty & Staff Federation of Community College of Philadelphia, Local 2026 of the American Federation of Teachers, Doc. 10242A, at 6 (same); United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Doc. 10237A, at 4 (same). Another commenter stated, “[w]orkers have the right to keep their medical information confidential and not have irrelevant health status information affect their employers’ decisions.” Families USA, Doc. 10327A, at 5. Moreover, the National Partnership for Women and Families noted that the Department already considered issues relating to the employer’s need for medical information and the employee’s right to medical privacy and struck the appropriate balance back in 1995 with the final regulations: “DOL has already considered comments regarding concerns about an employer’s ability to obtain medical information from a health care provider. The interim [1993] FMLA regulations entirely prohibited an employer from contacting the health care provider of the employee or the employee’s family member. In response to a number of comments, * * * DOL amended the regulations to allow an employer’s health care provider to contact an employee’s or a family member’s health care provider to clarify or authenticate the information in this medical certification. In arriving at this

compromise, DOL limited this contact to an employer’s health care provider to protect the privacy interests of employees and their families and ensure that their medical information was only being shared between medical professionals.” Doc. 10204A, at 20 (footnotes omitted); *see also* Service Employees International Union District 1199P, Doc. FL104, at 5 (same); American Federation of Labor and Congress of Industrial Organizations, Doc. R329A, at 42–43 (same).

3. Interaction of Health Insurance Portability and Accountability Act and Medical Certification Process

As noted in the Request for Information, the most significant law passed since the FMLA with regard to employee medical information is the Health Insurance Portability and Accountability Act (“HIPAA”). HIPAA addresses in part the privacy of individually identifiable health information. The Department of Health and Human Services (“HHS”) issued regulations found at 45 CFR Parts 160 and 164 that provide standards for the privacy of individually identifiable health information. The HIPAA regulations do not impede the disclosure of protected health information for FMLA reasons if the employee has the health care provider complete the medical certification form or a document containing the equivalent information and requests a copy of that form to personally take or send to the employer. HIPAA regulations, however, clearly do come into play if the employee asks the health care provider to send the completed certification form or other medical information directly to the employer. In such situations, HIPAA will generally require the health care provider to first receive a valid authorization from the employee before sending the information to the employer.

There is no requirement under the FMLA that employees sign a release allowing employers to access their medical information. In the preamble to the final regulations, the Department specifically rejected the idea of requiring employees to execute a medical release as part of the certification process as unnecessary. *See* 60 FR 2180, 2222 (Jan. 6, 1995) (“The Department has not adopted the suggestion that a waiver by the employee is necessary for FMLA purposes. The process provides for the health care provider to release the information to the patient (employee or family member). The employee then releases the information (form) to the employer. There should be no concern

regarding ethical or confidential considerations, as the health care provider's release is to the patient."'). Employers, however, always have the statutory right under the Act to obtain sufficient medical information to determine whether an employee's leave qualifies for FMLA protection, and it is the employee's responsibility to ensure that such information is provided to the employer. If an employee does not fulfill his or her obligation to provide such information upon the employer's request, the employee will not be entitled to FMLA leave. *See* 29 CFR 825.307–825.308; Wage and Hour Opinion Letter FMLA–2004–2–A (May 25, 2004). Some commenters believe that the HIPAA regulations restricting the flow of medical information from health care providers to third parties have created tension with the employer's right to medical information under the FMLA and have caused difficulties for employees seeking to exercise their FMLA rights. *See, e.g.*, Krukowski & Costello, S.C. (on behalf of Legislative Committee of the Human Resource Management Association of Southeastern Wisconsin), Doc. 10185A, at 3 ("[W]hen an employer may attempt to ascertain the true nature of any given absence, the employee then uses HIPAA as a shield designed to prevent the employer from obtaining any further information in order to clear up any ambiguities (or discover potential abuses)."); Methodist Hospital, Thomas Jefferson University Hospital, Doc. FL76, at 2 ("With HIPAA regulations physicians are reluctant to share information with Employers who are trying to accommodate Employee medical conditions to minimize absence."); American Academy of Family Physicians, Doc. FL25, at 3 ("We agree with comments that the Health Insurance Portability and Accountability Act (HIPAA) has created confusion about the disclosure of information on the FMLA form. As employers are not covered entities, disclosure directly to the employer is prohibited without an authorization by the patient.")

Several commenters reported that they have experienced increased difficulties with obtaining medical certifications from health care providers as a result of HIPAA. *See, e.g.*, AIG Employee Benefit Solutions' Disability Claims Center, Doc. 10085A, at 2–3 ("More than one Provider has written 'HIPAA' across the Form and returned it."); Briggs & Stratton Corporation, Doc. FL37, at 4 ("[M]any physicians still insist that they are prohibited by HIPAA from responding to questions on the

Certification."'). As a result of these difficulties, several commenters—including some medical providers—suggested that employees be required to sign a release as part of the certification requirement allowing the employer to communicate directly with the employee's health care provider. *See, e.g.*, American Academy of Family Physicians, Doc. FL25, at 3 ("The specific information required by the FMLA certification form and lack of an authorization on the form releasing the information may lead to inadvertent HIPAA violations. We would recommend the addition of an authorization to release medical information to the certification form which would allow the patient to indicate their authorization to release information to a family member or directly to the employer."); Ed Carpenter, Human Resource Manager, Tecumseh Power Company, Doc. R123, at 1 (certification process would be made easier if employee signed a release allowing the employer to contact employee's health care provider); Williams Mullen, Doc. FL124, at 3 ("DOL should coordinate HIPAA and FMLA issues, including medical certifications with HIPAA waivers, to make the process of medical information consistent."). Other commenters, however, objected to requiring employees to provide medical releases in exchange for requesting FMLA leave. *See* United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, at 4 ("The USW asks the DOL to clarify that employees are not required to provide a release of medical information to the employer as a condition of applying for or receiving FMLA leave.")

Finally, some commenters suggested that the protections afforded to employee medical information by HIPAA have obviated the need for employers to get employee consent for clarification of FMLA certifications. *See* Ohio Public Employer Labor Relations Association, Doc. FL93, at 6 ("With HIPAA laws protecting confidential medical information, the excessive restrictions found in 29 CFR 825.307 are unnecessary and should be removed."); Taft, Stettinius & Hollister LLP, Doc. FL107, at 5 ("HIPAA and similar laws provide ample protection for personal health data and the employee's health care provider can always refuse to disclose information if he or she considers a request for clarification to implicate privacy issues."); Hewitt Associates, Doc. 10135A, at 15 ("[G]iven HIPAA concerns, it's likely that the

employee will still have a check over the process as the health care provider would require the employee's permission before he or she would speak with the employer."); *see also* National Retail Federation, Doc. 10186A, at 17 ("The professional standards binding health care providers serve as a sufficient "check" on the scope of the inquiry.").

4. Recertification and Second and Third Opinions

The medical verification process does not end with the initial medical certification. Employers who question the validity of an employee's medical certification have the right to require a second opinion from a health care provider of their choosing. *See* 29 CFR 825.307. Where the second opinion conflicts with the initial certification, the regulations allow the employer to obtain a final and binding third opinion from a jointly-designated health care provider. *See id.* Additionally, employers have the right to require employees to provide subsequent recertification for conditions that persist over time. *See* 29 CFR 825.308. The Request for Information sought comments regarding several aspects of the recertification and second opinion processes. Comments were sought regarding the time frame for recertification and the requirement that requests for recertification be made only in connection with an absence. Comments were also sought on whether the second and third opinion process should be extended to apply to recertifications in addition to the initial certification.

a. Timing of Recertifications

Several commenters recommended that employers should be allowed to seek recertification every thirty days regardless of the minimum duration of the need for leave set forth in the certification. *See, e.g.*, United Parcel Service, Doc. 10276A, at 11 ("As currently drafted, [the] language permits employees to evade the 30-day recertification requirement by having their health care provider specify a longer period of time."); University of Minnesota, Doc. 4777A, at 1 ("In all cases, employers should have the right to request recertification from an employee on FMLA leave every thirty days."); Carolyn Cooper, FMLA Coordinator, City of Los Angeles, Doc. 4709, at 1 ("A remedy to this manipulation or gaming of the medical certification restriction pertaining to intermittent/reduced work schedule leaves is to allow employers to request recertification every 30 days, regardless

if the duration indicated in the initial medical certification is greater than 30 days.”). The National Coalition to Protect Leave made a related point that recertifications should be permitted every thirty days irrespective of whether there was an absence during that period. *See* National Coalition to Protect Family Leave, Doc. 10172A, at 49 (“Employers should always be allowed to obtain recertification every 30 days as long as the initial certification indicates the leave needed is ongoing; the right of an employer to request recertification in such circumstances should not be limited to whether an employee had an ‘absence.’); *see also* Hewitt Associates, Doc. 10135A, at 17 (“Simplify § 825.308 by deleting the requirement that employers can only request recertification ‘in connection with an absence’ allowing employers to ask for a recertification every 30 days.”).

Many of the commenters seeking more frequent recertifications cited the desire to control unforeseen, intermittent absences due to chronic conditions. *See* Pierce Atwood, LLP (on behalf of Maine Pulp & Paper Association), Doc. 10191A, at 2–3 (“Given the fact that intermittent leave is widely abused, employers need more flexibility to request recertification for intermittent leave than for serious health conditions that render the employee unable to work for the full 12 weeks.”); Nancy Dering Martin, Deputy Secretary for Human Resources and Management, Commonwealth of Pennsylvania, Doc. FL95, at 4 (“Also, because of the potential for abuse, we recommend Section 825.308 be further revised to allow employers to require a medical excuse indicating the time of the appointment or treatment when leave is used intermittently, the absence is unexpected, or the employer suspects abuse.”); Milwaukee Transport Services, Doc. FL80, at 2 (“One regulatory change that would assist employers such as MTS in curbing intermittent leave abuse would involve revising the current recertification regulation, 29 CFR [§] 825.308, by allowing an employer to require medical documentation of the need for intermittent FMLA leave on any occasion on which such leave is taken.”). Several of these commenters suggested that employers should be allowed to obtain medical verification of each intermittent absence even if that verification were more summary than a recertification. *See* Northrup Grumman Newport News Shipbuilding and Dry Dock Company, Doc. FL92, at 2 (“A rule could be added to require employees to provide documentation from the healthcare provider each time they

exercise intermittent leave, documenting specifically that the intermittent condition prevented attendance at work.”); Spencer Fane Britt & Browne LLP, Doc. 10133C, at 32 (“The employee should not be permitted to be the only party who determines the medical necessity of an absence on any particular day. * * * If an employee is ill enough to miss work, the employee should be required to visit or at least consult by phone with his/her doctor.”); Seyfarth Shaw LLP (on behalf of a not-for-profit health care organization), Doc. 10132A, at 4 (“We suggest as an alternative an amendment to the regulations so that an employer can request documentation from the employee’s health care provider pursuant to a uniformly applied policy for similarly-situated employees for any unforeseen, intermittent absence of less than a work day due to a chronic serious health condition.”).

Employee commenters objected to more frequent recertifications, however, because of the additional burden placed on employees. *See, e.g.,* International Association of Machinists and Aerospace Workers, Doc. 10269A, at 4 (“[O]ur members find that the requirement to recertify every thirty days is incredibly burdensome. * * * [I]t is very expensive for employees to get re-certifications. Some employees, particularly in rural areas, have to travel long distances to even see their doctors. It is ironic that often these employees actually have to miss more work time just to get the recertification.”); An Employee Comment, Doc. 4738, at 1 (“For an employer to repeatedly request for recertifications every 30 days, for an chronic Asthmatic who has an unforeseeable mild flare-up that can be taken care of with prescription medication, seems unreasonable and repetitious.”); Kennedy Reeve & Knoll, Doc. 4763A, at 17 (“The frequency with which some employers are requiring notes and recertification is both logistically (due to the availability of doctor’s appointment times) and financially burdensome on the employee and physician.”); An Employee Comment, Doc. 4582, at 1 (“[E]ven though my mother’s illness is terminal and my father’s condition is considered lifetime, I still am required to fill out forms and have a doctor sign them every 3 months. The physician’s office now charges me \$20 for each form I have to have them sign. As you can imagine, this takes a lot of time and money.”).

Physicians also objected to allowing recertifications every 30 days for conditions that are medically stable: “This is a burden to physicians who

spend time completing the form to indicate that a chronic condition is still being managed. It would lessen this burden to allow recertification only for those conditions which are not categorized as chronic care or permanent disability.” American Academy of Family Physicians, Doc. FL25 at 3; *see also* Mark Blick DO, Rene Darveaux MD, Eric Reiner MD, Susan R. Manuel PA–C, Doc. FL292, at 1 (“One employer requires us to complete the form every 60 days (ATT/SBC), one employer every 90 days and another every year. Chronic conditions extending a patient’s lifetime such as diabetes and hypertension are not going to change and there is no reason the form has to be updated multiple times throughout the year.”). Another commenter suggested that employers are abusing the recertification process and using repeated requests for recertification to discourage employees from taking FMLA leave:

[E]mployees bear the expense and burden of having to secure re-certifications and run the risk of denials if health care providers do not cooperate (or fail to do so in the relatively short time required by the employer), even though the serious and chronic nature of their medical condition is well documented. In fact, we believe that, in some work locations, these re-certification requests are thinly veiled efforts to discourage employees from taking intermittent FMLA leave and/or to retaliate against them for needing to do so.

Communications Workers of America, Doc. R346A, at 12.

b. Second and Third Opinion Process

Several employers commented on the expense involved in the second and third opinion process. *See, e.g.,* Honda, Doc. 10255A, at 11 (“Based upon Honda’s experience, second and third opinions average over \$700 per second or third opinion, and cost the employees their time.”); Spencer Fane Britt & Browne LLP, Doc. 10133C, at 25 (“Second and third opinions have proven expensive and difficult to obtain.”); Yellow Book USA, Doc. 10021A, at 2 (asserting that second opinions are so expensive they are not used); Zimbrick, Inc., Doc. FL125, at 12 (“We have not requested a second opinion. The cost, time and negative impact on employee morale is prohibitive.”). Other commenters noted practical concerns regarding finding physicians to perform second opinions. *See, e.g.,* United States Postal Service, Doc. 10184A, at 19 (“We are experiencing increasing difficulty finding physicians who will perform a second opinion medical exam. Although we do not keep numbers on refusal rates, our national FMLA coordinators

regularly voice concerns about this problem.”); *Foley & Lardner LLP, Doc. 10129A*, at 5 (“Our experience shows that second opinions are rarely used due to delay inherent in locating a health care provider and scheduling an examination and due to the expense associated with obtaining these opinions.”); *Coolidge Wall Co., Doc. 5168*, at 1 (“Even in larger cities it can be difficult to find doctors in a specialty who are willing to do FMLA second opinion examinations.”); *FNG Human Resources, Doc. FL13*, at 5 (“Requesting a second opinion is neither economically feasible nor beneficial in our area. We do not find healthcare providers willing to state that another provider is incorrect in his/her diagnosis.”).

Some commenters suggested that employers should be allowed to use doctors with whom they have relationships for second opinions because these health care providers are more familiar with the work environment and job requirements. *See, e.g., Air Conference, Doc. 10160A*, at 13 (“[O]ur member carriers have developed relationships with health care providers who understand our industry and operating environment and who are very familiar with the essential functions of airline jobs.”).

Two commenters expressed frustration that even where the second and third opinion process resulted in a determination that the employee was not entitled to FMLA leave, employees have attempted to subvert the process by submitting a new certification for the same condition thus initiating the review process anew. *See United States Postal Service, Doc. 10184A*, at 19 (“[A] number of employees * * * subsequently submit a new medical certification from their original health care provider which counters the information in that second/third opinion. The employees then argue that the employer must go through the second opinion process again.”); *Exelon, Doc. 10146*, at 6 (“Even if both the second and third opinion providers disagree with the employee’s own provider, after the process has been concluded, the regulations do not preclude the employee from submitting a new certification to support a new absence, and subsequent absences, from work for the same medical condition for which a second and third opinion were obtained.”).

c. Expanding Second Opinions to Recertification

Despite employer frustrations with the costs and utility of the second and third opinion process, however, some

employers sought to expand the use of the process to recertifications. *See, e.g., National Coalition to Protect Family Leave, Doc. 10172A*, at 49 (“Permitting second and third opinions [on recertifications] will provide substantial benefits to both employers and employees. Employers will not have to incur the unnecessary expense of obtaining second and third opinions based on a doubtful initial certification unless a pattern of abuse in fact develops without losing the opportunity to challenge the certification at a later date. Employees will also benefit, since they will not have to go for second and third opinions if they do not abuse FMLA leave even if their original medical certification creates doubt as to the validity of the need for leave.”); *United States Postal Service, Doc. 10184A*, at 17 (“[A] second opinion should be allowed during the lifetime of an employee’s condition, so long as there is reason to doubt the validity of the information in the certification.”); *Air Conference, Doc. 10160A*, at 13 (“Second and third opinions should also be available to employers on a medical recertification.”).

Commenters noted that the statute is silent as to the availability of second opinions on recertification and argued that the Department should not prohibit their use by regulation. *See City of New York, Doc. 10103A*, at 9 (“Under 29 CFR 825.308(e), employers are specifically barred from seeking a second or third opinion on a recertification. The FMLA, however, does not bar an employer from seeking additional opinions for a subsequent recertification.”); *National Coalition to Protect Family Leave, Doc. 10172A*, at 49 (“Subsection 29 CFR 825.308(e) prohibits employers from obtaining second and third opinions in connection with recertifications despite the fact that no statutory prohibition exists with regard to such requests.”); *Association of American Railroads, Doc. 10193A*, at 4 (noting that the prohibition on second and third opinions on recertification is not based on the Act). Other commenters, however, viewed the statutory silence differently, arguing that the statute only provides for second opinions on the initial certification and therefore they should not be permitted on recertification. *See American Federation of Labor and Congress of Industrial Organizations, Doc. R329A*, at 44; *National Partnership for Women & Families, Doc. 10204A*, at 22–23 (“The regulations do not allow employers to request second opinions for medical recertifications because the statute itself only provides for second opinions in the context of initial certifications.”). *Honda*

urged that the Department’s 2005 opinion letter concerning reinitiating the medical certification process on an annual basis, and with it the availability of the second opinion process, be incorporated into the regulations. *See Honda, Doc. 10255A*, at 15; *see also American Federation of Labor and Congress of Industrial Organizations, Doc. R329A*, at 44 (“[T]he regulations currently permit employers to reinitiate the medical certification process twelve months after leave commences, including requests for second and third opinions, regardless of past certification for the same health condition.”); *Wage and Hour Opinion Letter FMLA–2005–2–A* (Sept. 14, 2005).

The United States Postal Service argued that allowing second opinions on recertifications would ultimately inure to the benefit of employees. *See Doc. 10184A*, at 19 (“When an employer knows that it has the option of a second opinion if later needed, it is more likely to allow the protection at the outset even in instances where it may have some concern about the certification. The employee will be more content, as the leave request is quickly approved and he/she is spared a second medical exam.”). The National Partnership for Women & Families disagreed, however, stating that the extension of the second and third opinion process to recertifications would burden employees. *See Doc. 10204A*, at 22–23 (“[A]llowing employers to request second opinions on recertifications would unfairly burden employees for taking leave to which they are entitled.”).

d. Adequacy and Use of Current Medical Verification Process

Finally, some commenters suggested that, if properly used, the recertification and second and third opinion processes set forth in the current regulations provided employers with ample tools to control FMLA leave usage.

At present, we believe that the regulations provide a manageable balancing of the employer’s need for accurate information demonstrating that the leave is covered by the Act and the employee’s important privacy interest. The regulations also establish a clear framework within which to evaluate leave requests when good faith questions arise—the second and third opinion process. Because of the concerns that this existing process is not being followed by many employers, we urge DOL to take steps to evaluate whether that process is being utilized appropriately.

Coalition of Labor Union Women, Doc. R352A, at 6; *see also 9to5, National Association of Working Women, Doc. 10210A*, at 4 (“Robust employer

safeguards already exist in the current regulations. Employers are allowed to ask for second and third opinions from alternate doctors for an FMLA request. Employers have always had the ability to handle suspicious patterns of time off, just like any other personnel problem.”); Kennedy Reeve & Knoll, Doc. 4763A, at 14–15 (“Instead of utilizing the certification process and the second and third opinion process within the regulations, many employers are now choosing to forgo some or all of those processes, and instead litigating these issues at a high price to everyone, including the courts. In order to avoid costly litigation and in order to provide more stability in the administration of leaves of absences, the regulations should require the use of a consistent form and also require the utilization of the regulatory enforcement procedures[.]”).

5. Medical Certification of the Employee's Ability To Return To Work (“Fitness for Duty Certifications”)

Section 825.310 of the regulations allows employers to require medical certification of the employee's fitness to return to work under certain circumstances. Section 825.310(g), however, bars employers from seeking a fitness for duty certification from employees returning to work after taking intermittent leave. *See* 29 CFR 825.310(g). The Request for Information sought comments on the benefits and burdens of removing this restriction and allowing fitness for duty certifications for employees returning from intermittent leave.

Many commenters questioned the rationale for the different treatment the regulations accorded to different types of leave and argued that safety concerns support requiring fitness for duty certifications for intermittent leave.

Exempting chronic conditions from return to work clearance seems to make little sense because those conditions are just as likely as any other to compromise the health or safety of the workforce. Indeed, some chronic conditions are even more likely to give rise to a justifiable need for return to work clearance than the other serious health conditions under the FMLA. For example, an employer may have little concern about the clerical assistant returning to work after giving birth, but far more (and legitimate) concern about allowing a utility worker to return after a series of epileptic seizures on the job.

United States Postal Service, Doc. 10184A, at 20; *see also* Honda, Doc. 10255A, at 14 (“Not permitting fitness-for-duty medical forms for FMLA Intermittent Leaves puts employers and employees at risk. Such a prohibition

creates an exception to most employers' policies or practices when an employee has been incapacitated for any medical reason for more than a brief period.”); MGM Mirage, Doc. 10130A, at 10 (“Quite simply, an employee places his/her physical condition at issue by requesting FMLA leave. This is true regardless of whether the employee was absent as result of continuous or intermittent leave.”).

Some employers noted that the particular safety concerns inherent in their workplaces necessitated that they obtain clear information regarding an employee's ability to safely return from leave. *See* Union Pacific Railroad, Doc. 10148A, at 6 (noting that clear information regarding their employees ability to work is critical as “those very employees are entrusted with jobs that affect the safety and security of the general public”); Honda, Doc. 10255A, at 14 (“In manufacturing, many of the jobs include safety-sensitive duties. Therefore, the current regulation prohibiting a fitness-for-duty form for intermittent leaves puts the employee and his/her co-workers at risk and requires the employer to assume a legal risk for liability, if there is an accident caused by the reinstated employee.”); City of New York, Doc. 10103A, at 7 (“Fitness for Duty Certifications for employees in safety-sensitive positions who are intermittently absent should be an option for employers. For example, if a sanitation worker responsible for driving a two-ton truck on public roadways takes intermittent leave to treat high blood pressure, a fitness for duty certification should be required before the employee is restored to the position which carries an extreme responsibility to the public.”). These employers suggested that the FMLA return to work process undercuts legitimate employer safety programs. For example, the Maine Pulp & Paper Association submitted the following statement:

Employees in the paper industry routinely work with hazardous materials in close proximity to heavy machinery. Forcing employers to accept the employee's medical provider's simple statement that the employee “is able to resume work,” or worse, in the case of an intermittent leave-taker, accept the employee's word alone with no medical verification whatsoever jeopardizes the safety of co-workers and increases exposure to expensive workers' compensation claims. MPPA's members have strong safety programs which should not be undercut by administrative requirements of the FMLA.

Pierce Atwood, LLP (on behalf of Maine Pulp & Paper Association), Doc. 10191A, at 4.

Several employers suggested the Department should delete or revise this section of the regulations so that employers would have the same right to seek fitness for duty certifications from employees returning to work from intermittent leave. *See, e.g.,* Willcox & Savage, Doc. 10088A, at 6; Foley & Lardner LLP, Doc. 10129A, at 5; National Coalition to Protect Family Leave, Doc. 10172A, at 50. The National Partnership for Women & Families, however, argued that requiring employees returning from intermittent leave to provide fitness for duty certifications—which are to the employee's expense—would significantly undermine the statutory purpose behind allowing employees to take intermittent leave. *See* Doc. 10204A, at 23 (“Any benefit to the employer of obtaining fitness for duty statements from intermittent leave-takers is far outstripped by the unwarranted burden that such a change in the regulations would impose on employees. * * * The intermittent leave option helps to take some of the financial strain off employees by enabling them to continue to earn a paycheck while addressing serious health or family needs, and allows employees to preserve as much of the twelve weeks of leave as possible.”) (footnotes omitted). The AFL–CIO also noted that “[r]equiring employees who take intermittent leave to present fitness for duty certifications for potentially every absence is burdensome and unnecessary.” Doc. R329A, at 44. *See also* National Business Group on Health, Doc. 10268A, at 4 (“It would be an administrative headache to require a fitness for duty statement from an employee who is absent intermittently. The added paperwork to cover this would be overly burdensome.”); Kennedy Reeve & Knoll, Doc. 4763A, at 18 (“[T]he logistical impossibility and financial burdens of allowing employers to require fitness-for-duty statements for each and every day of absence make such a policy not feasible.”). In an attempt to address the costs concern, one commenter suggested that employers bear the cost for fitness for duty certifications when the employee is returning from intermittent leave. *See* United Parcel Service, Doc. 10276A, at 6.

Finally, some commenters commented that the return to work process under the FMLA conflicted with the return to work process under the ADA, with the latter providing a better model because it allows both more substantive information and physical examinations. *See infra* Chapter VII.

6. WH-380 Form

The Department provides an optional model certification form titled "WH-380" to assist employers who require employees to provide medical certification of their need for FMLA leave. The form can be used for initial certification or recertification, as well as for second and third opinions. While employers may use a form other than the WH-380, they may not require information beyond what is required by the sample form. 29 CFR § 825.306(b). The Request for Information sought comments on how this form is working and what improvements could be made to it to facilitate the certification process.

Several commenters expressed frustration with the current form, finding it overly long and complicated. *See, e.g., American Academy of Family Physicians, Doc. FL25, at 2* ("The form WH-380 is overly complicated and confusing in its format."); *Spencer Fane Britt & Browne LLP, Doc. 10133C, at 27* ("DOL's prototype medical certification form * * * is confusing to employers, employees, and health care providers."); *United Parcel Service, 10276A, at 10* ("The current WH-380 form is poorly drafted and confusing."); *Courier Corporation, Doc. 10018A, at 3* ("We feel the Certification of Health Care Provider (Optional Form WH-380) is far too vague."); *Association of Corporate Counsel, Doc. FL31, at 10* ("The current form is confusing and often results in incomplete or vague responses by health care providers that are insufficient to assess the employee's eligibility for leave or the timing of the leave.").

Several commenters suggested that the form could be simplified if it was broken into multiple forms, with separate forms either for intermittent and block leave, or for leave for the employee and leave for the employee's family member. *See, e.g., Yellow Book USA, Doc. 10021A, at 3* (suggesting separate forms for block and intermittent leave); *National Counsel of Chain Restaurants, Doc. 10157A, at 16* (suggesting separate forms for employee and family members); *Indiana University, School of Medicine, Department of Orthopedic Surgery, Doc. FL70, at 1* (same); *Ohio Department of Administrative Services, Doc. 10205A, at 6* (same). *Spencer Fane* recommended that the Department actually develop four different versions of the form for: "(a) Continuous leave for employee's own serious health condition; (b) continuous leave for serious health condition of a family member; (c) reduced schedule/intermittent leave for employee's own serious health

condition; and (d) reduced schedule/intermittent leave for serious health condition of a family member." *Doc. 10133C, at 32*.

Commenters also suggested ways to make the current form more useful to employers and easier for health care providers to understand and to complete. *See, e.g., Courier Corp., Doc. 10018A, at 4* (Suggesting that the "form could be modified to be in more of a checkbox format, that might facilitate the physician's office in actually completing it more fully and providing better information for the employer to evaluate the need for leave."); *United States Postal Service, Doc. 10184A, at 12* (advocating elimination of serious health condition checklist in favor of description of medical facts); *National Coalition to Protect Family Leave, Doc. 10172A, at 47* ("DOL can make the form more user-friendly by streamlining the information requested instead of asking the health care providers to respond to a page and a half of specific questions.") (footnote omitted). A physicians group suggested that use of a standard form, as opposed to individual employer variations, would reduce the burden on health care providers. *See American Academy of Family Physicians, Doc. FL25, at 2; see also Kennedy Reeve & Knoll, Doc. 4763A, at 14* ("The model certification form must be simplified, and then it must be the required form for employers to use.").

Several commenters suggested that the Department "allow an employer the option of identifying key job skills and tasks, similar to the [ADA], to allow the doctor to make a more informed decision about the necessity of leave with respect to the specified essential job functions[.]" *U.S. Chamber of Commerce, Doc. 10142A, at 8; see also United States Postal Service, Doc. 10184A, at 14* (form should include "a statement that the provider has been informed of the employee's essential job functions"). Another commenter, however, noted that the FMLA regulations already permit employers to "include a job description with the medical certification form given to the treating physician" but that few employers utilize this process. *Kennedy Reeve & Knoll, Doc. 4763A, at 5*.

Commenters also suggested that the WH-380 should include a diagnosis, something that was included in the form published with the interim FMLA regulations but was removed from the form when the regulations were finalized. *See Preamble to Final FMLA Regulations, 60 FR 2180, 2222 (Jan. 6, 1995)* ("The regulation and form no longer provide for diagnosis."); *see also South Central Human Resource*

Management Association, Doc. 10136A, at 11 ("an employer should be permitted to obtain diagnosis and prognosis"); *Detroit Medical Center, Doc. 10152A, at 2* ("It is critical that the regulations and WH-380 form be changed to require actual diagnoses to determine whether an employee's absences correlate with the medical certification."). One such commenter stated that "the FMLA's current restriction on obtaining a diagnosis creates an unnecessary and awkward limitation on the employee's health care provider in completing the medical certification form and the employer's health care provider in seeking clarification of information contained in that form. Generally, meaningful communications between the health care providers cannot take place without some discussion about the actual diagnosis, particularly if second and third opinions are involved." *MedStar Health, Inc., Doc. 10144A, at 17*.

Finally, some commenters noted that the WH-380 does not include all of the information that an employer is entitled to under the Act. Importantly, multiple commenters noted that the current form does not require the health care provider to certify the medical necessity for intermittent leave, which is a statutory requirement for the taking of such leave. *See 29 U.S.C. § 2612 (b); see also National Coalition to Protect Family Leave, Doc. 10172A, at 47* ("In the case of intermittent leave, the medical necessity for the intermittent or reduced schedule also should be specified in accordance with 29 CFR § 825.117 (not currently asked on the model form)."); *Society for Human Resource Management, Doc. 10154A, at 18* (same); *American Electric Power, Doc. FL28, at 5* ("Unfortunately, the statutory requirement that 'medical necessity' be demonstrated by employees seeking intermittent leave has been effectively eliminated by the Department's regulations."). Another commenter noted that the current form also does not solicit the information necessary to allow employers to determine whether an employee is entitled to FMLA leave to care for a child who is 18 years old or older. *Honda, Doc. 10255A, at 13* (suggesting that in order for employers to determine whether an adult child is covered under the FMLA the form should be amended to include: "[1] Whether the adult child has a physical or mental disability; [2] Whether the physical or mental disability has caused the child to be incapable of self-care; and [3] A checklist of 'activities of daily living' and 'instrumental activities of daily

living' that the adult child cannot perform.'").

VII. Interplay Between the Family Medical Leave Act and the Americans With Disabilities Act

The Department's Request for Information noted that several organizations had reported the FMLA's "interaction with other laws," including Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. 12101–12117, 12201–12213 (1994) ("ADA"), was a "potential source of confusion."¹⁵ In seeking comments on section 825.307 of the FMLA implementing regulations, which permits an employer to contact the employee's health care provider for purposes of clarification and authentication only through the employer's health care provider and only with the employee's permission, the Department specifically asked how this provision "[should] be reconciled with the [ADA], which governs employee medical inquiries and contains no such limitation on employer contact?" Although not directly mentioning the ADA, the Department also asked for information relating to the "implications of permitting an employer to modify an employee's existing job duties to meet any limitations caused by the employee's serious health condition as specified by a health care provider, while maintaining the employee's same job, pay, and benefits."

The ADA, which is enforced by the United States Equal Employment Opportunity Commission ("EEOC"), the Department's Office of Federal Contract Compliance Programs, and the Department of Justice, prohibits private employers, state and local governments, employment agencies, and labor unions from discriminating in employment against qualified individuals with disabilities. See 42 U.S.C. 12101–12117, 12201–12213. The statute includes an affirmative obligation to provide reasonable accommodation to the known disability of a qualified applicant or employee, unless doing so would pose an "undue hardship." See 42 U.S.C. 12112 (b)(5)(A). Under the ADA, an employee who needs medical leave related to his or her disability is

entitled to such leave if there is no other effective accommodation and the leave will not cause an "undue hardship" on the employer's business operations. See EEOC, Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (hereafter, "EEOC Reasonable Accommodation Guidance"), at Question 21. The FMLA, enforced by the Department's Wage and Hour Division, entitles "eligible" employees of covered employers up to 12 weeks of unpaid, job-protected leave each year—with continuation of group health insurance coverage under the same conditions as prior to leave—for specified family and medical reasons, including the employee's own serious health condition. See 29 U.S.C. 2612, 2614(c). The FMLA does not include a provision for "reasonable accommodation," nor does it limit the availability of leave to situations where the employee's absence would not cause an "undue hardship" for the employer. Nonetheless, one of the stated purposes of the FMLA is to allow an employee to take reasonable leave for medical reasons "in a manner that accommodates the legitimate interests of employers." 29 U.S.C. 2601(b).

While both statutes provide employees with job-protected medical leave, as the FMLA's legislative history makes clear, "the leave provisions of the [FMLA] are wholly distinct from the reasonable accommodation obligations of employers covered under the [ADA]." S. Rep. No. 3, 103d Cong., 1st Sess. 38 (1993). Indeed, the two Acts have distinctively different purposes: the ADA is intended to ensure that qualified individuals with disabilities are provided with equal opportunity to work, while the FMLA's purpose is to provide reasonable leave from work for eligible employees. Compare 42 U.S.C. 12101 and 29 CFR 1630.1 (Title I of the ADA requires equal employment opportunity for qualified individuals with disabilities) with 29 U.S.C. 2601(b) (one of the purposes of the FMLA is "to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition"). Recognizing this fact, section 825.702(a) of the FMLA implementing regulations provides that "[a]n employer must therefore provide leave under whichever statutory provision provides the greater rights to employees." See also EEOC, Fact Sheet: The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964

(hereafter, "EEOC FMLA and ADA Fact Sheet"), at Question 17.

Moreover, an FMLA "serious health condition" is not necessarily an ADA "disability." An ADA disability is an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. See 42 U.S.C. 12102(2). While some conditions that qualify as serious health conditions under the FMLA may be ADA disabilities (e.g., most cancers and serious strokes), other qualifying serious health conditions under the FMLA may not be ADA disabilities. For example, periods of incapacity due to a routine broken leg or hernia could qualify as an FMLA serious health condition, but not be a qualifying disability under the ADA because the impairment is not substantially limiting. Similarly, incapacity due to pregnancy (e.g., severe morning sickness) qualifies as a serious health condition under the FMLA, but may not be a disability under the ADA because the condition is not long-term or permanent. See EEOC FMLA and ADA Fact Sheet, at Question 9.

Despite the different purposes and scope of the two statutes, the FMLA and its implementing regulations borrow several important concepts from the ADA. For example, the Department relied on ADA concepts when defining one of the qualifying reasons for medical leave under the FMLA—because of an employee's own serious health condition. The statutory provision governing this issue provides that leave is available "because of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. 2612(a)(1)(D). The implementing regulations provide that leave entitlement accrues under this provision "where a health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position," as provided for under the ADA and the EEOC's regulations. 29 CFR 825.115. Under the ADA, a qualified individual with a disability is defined as an individual who, with or without reasonable accommodation, can perform all of the "essential functions" of the position in question. See 42 U.S.C. 12111(8). The ADA implementing regulations define essential functions as the "fundamental job duties" of the employment position. 29 CFR 1630.2(n).

The intersection of the ADA and the FMLA, and its implications for employees and employers, was the subject of much discussion by respondents to the Department's RFI.

¹⁵ Several commentators have called the intersection of the ADA, the FMLA, and workers' compensation laws the "Bermuda triangle of employment laws" because, while all three address employers' obligations towards employees with certain medical conditions, the responsibilities imposed by each are overlapping but distinctively different. Lawrence P. Postol, "Sailing the Employment Law Bermuda Triangle," *The Labor Lawyer*, Vol. 18, No. 2 (Fall 2002); Peter A. Susser, *Family and Medical Leave Handbook*, Vol. 6, No. 4, p. 7 (July 1998).

The comments focused on five broad areas of interplay between the two statutes, discussed in greater detail below: (1) The interaction between the FMLA employee notice provisions and the ADA prohibitions on medical inquiries; (2) obtaining medical information under the FMLA and the ADA; (3) confirming that an employee is fit to return to work after medical leave under the FMLA and the ADA; (4) offering light duty, modified work or transfers/reassignments under the FMLA and the ADA; and (5) permitting "reasonable leave for medical reasons" under the FMLA and the ADA.

A. The Interaction of the FMLA Employee Notice Provisions and the ADA Medical Inquiry Prohibitions

Under section 825.302 of the FMLA implementing regulations, an employee must provide notice "sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave." The request may be verbal and the employee need not specifically mention the FMLA. See 29 CFR 825.302(c). The regulations permit an employer to "inquire further" about an employee's medical condition where insufficient information is initially provided. *Id.* The ADA, however, strictly proscribes the circumstances under which employers may make medical inquiries of employees, including those without ADA disabilities, providing that:

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature and severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

42 U.S.C. 12112(d)(4)(A); see also 29 CFR 1630.14(c).¹⁶ The ADA also prohibits discrimination in employment against individuals who are "regarded as" having an impairment by their employer. 42 U.S.C. 12102(2)(c) and 12112(a).

The Department received comments from employers and their representatives suggesting that employees need to be further educated about their obligations under the FMLA

to provide appropriate information about why leave is needed so that employers can fulfill their obligations under the Act if the leave is potentially FMLA-covered without violating the ADA's restrictions on medical inquiries or running the risk that they will be deemed to have "regarded" someone as disabled. More than one commenter noted that an employee's failure to provide adequate FMLA notice can place employers in an unreasonable situation. For example, the National Coalition to Protect Family Leave stated that employers often have been required to "read between the lines" by grasping unspoken behavioral clues that an employee may need [FMLA] leave," which places "employers—and their front-line managers—in the impossible position of having to navigate between compliance with the FMLA * * * and compliance with the [ADA] which restricts medical inquiries of employees and prohibits employers from 'regarding' individuals as disabled." Doc. 10172A, at 31–32. A law firm representing employers echoed similar concerns. Schwartz Hannum PC, Doc. 10243A, at 7 (cases reasoning that "unusual behavior" may itself constitute notice to employer of need for FMLA leave "impose an unreasonable expectation upon managers and human resources personnel * * * such employer representatives must be able to intuit when an employee's body language or behavior suggests that an FMLA leave may be appropriate.").

Still another commenter noted that "[e]mployers are wary of asking too many questions for fear of violating complicated limitations of the ADA." Employers Association of New Jersey, Doc. 10119A, at 7. This commenter stated that "employers err on the side of caution and grant many questionable FMLA requests to ensure the employee's rights are not violated." *Id.* at 8; see also National Public Employer Labor Relations Association, Doc. R358A, at 10 (suggestion in section 825.302 that employers may "inquire further" about an employee's medical condition when insufficient information is provided "flies in the face of what human resources managers have trained supervisors not to do under other federal laws," such as the ADA).

B. Obtaining Medical Information Under the FMLA and the ADA

While an employer's obligation to provide medical leave under both the FMLA and the ADA are triggered by similar employee notice provisions, the approach an employer must follow to obtain appropriate medical information to support the need for leave varies

depending on whether the employee's request is covered by the FMLA or the ADA. The statutory provisions of the ADA outline the factors to be considered when determining whether a reasonable accommodation must be granted (42 U.S.C. 12111(10)) and the types of medical inquiries and examinations that may be made (42 U.S.C. 12112(d)), but do not specify a particular process for considering an employee's request for reasonable accommodation. The EEOC's implementing regulations and interpretative guidance suggest that an employee and employer engage in an "interactive process" designed to confirm that the employee has an ADA-covered disability and to identify an effective accommodation for the employee's specific limitations. See generally 29 CFR Part 1630 and Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act ("This process of identifying whether, and to what extent, a reasonable accommodation is required should be flexible and involve both the employer and the individual with a disability."). As part of this process, the employer may request reasonable documentation about the nature, severity, and duration of the employee's impairment, and the extent to which the impairment limits the employee's ability to perform daily activities when the disability or the need for accommodation is not known or obvious. See EEOC Reasonable Accommodation Guidance, at Question 6; EEOC, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (hereafter, "EEOC Disability-Related Inquiries Guidance"), at Question 7. If the initial information provided is insufficient, the EEOC encourages the employer to "consider consulting with the employee's doctor (with the employee's consent)." EEOC Disability-Related Inquiries Guidance, at Question 11.

The FMLA, after appropriate notifications, allows the employer to require that the employee submit a certification from his/her health care provider to support the need for FMLA leave. If the employer questions the validity of the employee's certification, the employer may require second and/or third medical opinions to resolve the situation. See 29 U.S.C. 2613. The FMLA medical certification process prohibits an employer from contacting an employee's health care provider directly and restricts the scope and timing of information requests. See 29

¹⁶ EEOC Enforcement Guidance expressly provides that the ADA's restrictions on inquiries and examinations apply to all employees, not just those with disabilities, such that "[a]ny employee * * * has a right to challenge a disability-related inquiry or medical examination that is not job-related and consistent with business necessity." EEOC, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act, at General Principles Section.

CFR 825.303–825.311; (*See also* Chapter V for a discussion of employee notification rights and responsibilities and Chapter VI for a full discussion of the FMLA medical certification and verification process.)

Commenters routinely noted these differences between the ADA and the FMLA, and the difficulties caused when leave requests triggered obligations under both statutes. *See* International Foodservice Distributors Association, Doc. 10180A, at 2 (“The severe limitations on inquiries of healthcare providers certifying the presence of serious health conditions—more extreme than under the ADA or state workers’ compensation laws—should be revisited.”). Several of these commenters stated that the “FMLA restrictions particularly are problematic when employers face a request from an employee that triggers obligations under both the FMLA and ADA, given that the latter requires the employer to engage in interactive processes to accommodate the employee.” Temple University, Doc. 10084A, at 10; United States Postal Service, Doc. 10276A, at 9–10 (“When an FMLA-qualifying ‘serious health condition’ is also a potential ‘disability’ under the ADA, [section 825.306’s] restriction on medical information is in conflict with the ADA interactive process, which allows—and arguably requires—an employer to gather far more medical information regarding an employee so that it can make an informed decision regarding possible accommodations.”). Another commenter argued that the FMLA process “places artificial restrictions on access to necessary information regarding an employee’s serious health condition. The limitations imposed by the FMLA regulations go far beyond those imposed in such acts as the [ADA] and clearly fail to balance both employer and employee rights under the FMLA.” MGM Mirage, Doc. 10130A, at 7; *see also* U.S. Chamber of Commerce, Doc. 10142A, at 7 (“Employers found that the burdens of obtaining medical information under the FMLA are significantly greater” than inquiries under the ADA).

Several commenters contrasted employees’ obligations under the FMLA medical certification process with employees’ obligations under the ADA interactive process. *See, e.g.,* Pilchak Cohen & Tice, P.C., Doc. 10155A, at 23 (“employees should have a duty to cooperate with the employer, as they do under the ADA”). A law firm reported that its employer clients feel that their hands are tied when employees fail to complete and return FMLA medical certification forms. Proskauer Rose, Doc.

10182A, at 2. This commenter stated that, “[w]ith the frequent overlap between FMLA and employer-provided leave, and the interplay with disability discrimination and workers compensation laws, many employers are reluctant to risk disciplining an employee for the administrative failure to timely comply with the provision of information needed to make an FMLA eligibility determination.” *Id.*

Commenters also noted that the two statutes allow employers to obtain different information regarding an employee’s medical condition, with the ADA generally permitting a broader exchange of information. *See, e.g.,* South Central Human Resource Management Association, Doc. 10136A, at 11 (“The ADA allows an employer to obtain all relevant medical information in determining whether a ‘disability’ exists. The same approach should be used under the FMLA.”); *see also* MedStar Health, Inc., Doc. 10144A, at 17 (allow “employers’ health care providers to obtain information regarding the actual diagnosis of an employee’s serious health condition,” as is currently permitted under the ADA). Still other commenters suggested that the Department “allow an employer the option of identifying key job skills and tasks, similar to the [ADA], to allow the doctor to make a more informed decision about the necessity of leave with respect to the specified essential job functions.” U.S. Chamber of Commerce, Doc. 10142A, at 8; *see also* United States Postal Service, Doc. 10184A, at 14 (form should “include a statement that the provider has been informed of the employee’s essential job functions”).

Information received in response to the Department’s RFI suggests that one particularly problematic area for many employers is that the FMLA prohibits direct employer contact with the employee’s health care provider, while the ADA does not. *Compare* 29 U.S.C. 2613 with EEOC Disability-Related Inquiries Guidance, at Question 11. Several commenters noted that the FMLA “limitations associated with the clarification process were created solely by the regulations. Such limitations contradict what was expressly addressed and permitted by Congress when enacting the ADA just three years before the FMLA.” The National Coalition to Protect Family Leave, Doc. 10172A, at 46; *see also* Temple University, Doc. 10084A, at 10 (The FMLA restrictions on direct doctor contact are “purely a product of the regulation.”). One commenter summed up the difficult position it believes this places employers in:

If an employee requests reasonable accommodation under the ADA in connection with or before an FMLA request, therefore, the Company lawfully may have direct contact with the employee’s health care provider. In those cases, the rule that an employer may contact * * * the provider directly for one purpose but not for the other confuses employees and their providers. As well, whenever the Company contacts a provider for ADA purposes during the certification process, there is an inherent risk that the contact could be challenged as unlawful under the FMLA.

Progressive, Doc. FL2, at 4.

A number of retailers reported that this limitation “poses one of the biggest obstacles to preventing FMLA misuse and abuse. It also creates a conundrum for compliance-minded employers who are concerned about violating the FMLA when fulfilling their obligations under the ADA.” National Retail Federation, Doc. 10186A, at 17. Furthermore, some commenters felt that the prohibition against contact with the health care provider is unnecessary. One public employer asserted:

Comparison with the [ADA] demonstrates that these additional barriers are not necessary. The ADA, like the FMLA, requires employers to review an employee’s medical information and make determinations about the employee’s ability to work based on that medical information. The type of medical information reviewed under both statutory schemes is similar. Additionally, the employer’s staff members reviewing FMLA requests may also be responsible for making determinations regarding employee ADA accommodation requests.

City of New York, Doc. 10103A, at 8; *see also* Edison Electric Institute, Doc. 10128A, at 9 (“Our experience has shown no negative consequences of direct contact between employers and their employees’ health care providers in the ADA context.”); Clark Hill PLC, Doc. 10151A, at 3–4 (Because the ADA “clearly allows employers to make such job related inquiries to a health care provider on their own* * *. [t]he added burden of hiring a health care provider is not necessary”). Comments from the National Retail Federation also reflect this view:

Employers know based on the conversations they have with health care providers during the ADA process that the clarification and additional information they need usually does NOT require the involvement of another health care professional. The need to follow-up with the health care provider presents an exception and is borne out of legitimate needs, such as to gain a better understanding of an employee’s condition, to determine if the employee qualifies, and if so, what should the employer reasonably expect with respect to intermittent absences and to curb abuse.

National Retail Federation, Doc. 10186A, at 17.

These commenters, and numerous others, suggested that the Department “allow employers to contact the health care provider to confirm that appointments or treatments are being scheduled when least disruptive to operations * * * and for the purposes of clarification and to verify authenticity of the certification.” Commonwealth of Pennsylvania, Doc. 10042A, at 4; *see also* City of Philadelphia Personnel Department, Doc. 10058A, at 2 (arguing that Department should permit Human Resource department to contact employee’s doctor “when medical certification is vague and needs clarification” in same way practice is “currently permitted under the ADA”); Frost, Brown, Todd, LLC, Doc. 10137A, at 2 (eliminate barrier on direct doctor contact as “unnecessary and unjustified” given that such contact is permitted under ADA and most state workers’ compensation laws); International Public Management Association for Human Resources and International Municipal Lawyers Association, Doc. R350A, at 4 (allow employers to communicate directly with health care providers, as is permitted under ADA).

Other commenters suggested that employers be permitted to require that an employee provide a limited release allowing the disclosure of sufficient medical information to confirm the need for leave, as is permitted by the ADA. Seyfarth Shaw LLP (on behalf of a not-for-profit health care organization), Doc. 10132A, at 4 (suggesting that employers be allowed to require that employees seeking FMLA leave sign release authorizing employer to submit list of questions to employee’s health care provider as is permitted by ADA); *see also* United States Postal Service, Doc. 10184A, at 16–17 (noting that such an approach would be consistent with the ADA where it is “well settled law that an employee who refuses to provide an employer with sufficient medical information under the ADA can be denied the accommodation the employee seeks”). For a fuller discussion of comments relating to medical releases and medical certification forms generally, see Chapter VI.

More generally, many of the commenters stated that the FMLA certification process could be improved if a more interactive process, similar to that provided for under the ADA, was adopted. *See, e.g.*, Fairfax County Public Schools, Doc. 10134A, at 4–5 (ADA interactive process is “much better model” and FMLA “regulations should

encourage free communication in order for the parties to have a common understanding of medical limits and leave requirements”); Manufacturer’s Alliance/MAPI, Doc. 10063A, at 7 (suggesting that “the ADA informal interactive process used to gather information on an employee’s medical condition should be adopted under the FMLA”); Society for Human Resource Management, Doc. 10154A, at 17 (“By reconciling the processes permitted by the ADA with the FMLA, needless time and expense associated with the FMLA approval process will be eliminated.”); National Association of Manufacturers, Doc. 10229A, at 9 (“The ADA model should be adopted for the FMLA[.]”). A human resource management association stated that an interactive process would work better than the “exchange of paper” process currently in place under the FMLA:

While we understand the goals reflected by the FMLA, perhaps it would be less burdensome if employers were allowed to be involved in the back-and-forth discussion between the employee and physician as opposed to stressing the exchange of paper similar to the “interactive process” line of cases that has developed under the ADA * * *. When family and medical leave is properly certified, it is our experience that the leave is typically granted; however, when the circumstances surrounding the leave are less than clear or the doctor’s certification is less than straightforward, the employer is in a no-win situation.

Krukowski & Costello, S.C. (on behalf of Legislative Committee of the Human Resource Management Association of Southeastern Wisconsin), Doc. 10185A, at 4.

Commenters suggested a number of potential benefits that might flow from implementing similar processes for obtaining medical information under the ADA and FMLA. The City of New York stated that more consistent procedures would allow employers “to make informed decisions in a timely manner” and reduce administrative compliance burdens by allowing “staff members who review both FMLA- and ADA-related requests * * * to apply a similar inquiry procedure to both types of situations.” Doc. 10103A, at 9. Another commenter stated that adopting similar processes would eliminate confusion between the FMLA and ADA guidelines for medical inquiries and interactive discussion. Northern Kentucky Chamber of Commerce, Doc. 10048A, at 7. The Ohio Department of Administrative Services believed such a change would “diminish the requirement that the doctor correct vague or incomplete paperwork.” Doc. 10205A, at 4–5. Another commenter

suggested that the need for a second opinion examination would be reduced by incorporating ADA concepts into the FMLA certification process. *See* Pilchak Cohen & Tice, P.C., Doc. 10155A, at 22. A health care provider argued that coordinated procedures for obtaining medical information under the FMLA and the ADA would reduce employer costs of providing FMLA leave. MedStar Health, Inc., Doc. 10144A, at 17 (current rule creates an “unnecessary cost for employers, even for those with in-house employee health offices that are staffed by nurses but do not have a nurse practitioner or other FMLA health care provider”).

The AFL–CIO, however, argued that the clear distinctions between the “reasonable accommodation” provisions of the ADA and the “leave provisions” of the FMLA made the different procedures under each statute for obtaining medical information appropriate:

Since only “known physical or mental limitations” trigger an employer’s obligation to make reasonable accommodation under the ADA (§ 12112(b)(5)(A)), it is reasonable for employers to have direct contact with employees’ health care providers in certain limited situations. An ADA employer may require detailed medical knowledge of an employee’s disability in order to accommodate that disability in the workplace. Furthermore, it is advantageous for employees with disabilities if their employers understand their limitations.

The same concerns are not present with respect to FMLA medical determinations—employers are not required by the FMLA to make changes in the workplace to accommodate the serious health conditions of employees, and they therefore need less information than employers under the ADA in order to fulfill their statutory obligations. In the FMLA context, an employer does not need access to information beyond a doctor’s certification of the factors establishing the presence of a serious health condition under the statute and a doctor’s estimate of likely absences or duration of treatment.

American Federation of Labor and Congress of Industrial Organizations, Doc. R329A, at 42–43. The National Partnership for Women & Families also opined that the FMLA and the ADA raise different privacy concerns and thus that a different approach to protecting medical privacy is appropriate under the FMLA. *See* Doc. 10204A, at 21 (“The privacy concerns regarding employers’ access to medical information are heightened in the context of the FMLA because the FMLA governs the employer’s access not only to the medical information of employees, but also to the medical information of employees’ family members. This provides justification for additional caution in insuring the

privacy of medical information under the FMLA.”).

C. Confirming That an Employee Is Fit To Return To Work After Medical Leave Under the FMLA and the ADA

Under the ADA, an employer may require an employee returning from medical leave to provide a doctor's note, as long as it has a policy or practice of requiring all employees to do so, and may require an employee to submit to a fitness for duty examination when the “employer has a reasonable belief that an employee's present ability to perform essential job functions will be impaired by a medical condition or that s/he will pose a direct threat.” EEOC Disability-Related Inquiries Guidance, at Questions 15 and 17. The FMLA regulations, on the other hand, prohibit an employer from obtaining (except when governed by a collective bargaining agreement or State or local law) a fitness for duty examination when an employee returns from an intermittent leave absence, even if the request would be permitted under the ADA. See 29 CFR 825.310(g). The same section allows employers to require a fitness for duty certification pursuant to a uniformly applied policy, but limits that certification to a “simple statement” of an employee's ability to return to work and places limitations on an employer's communications with the employee's health care provider regarding the employee's ability to return to work that are not present under the ADA. 29 CFR 825.310(c).

As noted in Chapter VI, numerous commenters questioned the FMLA restrictions on fitness for duty certifications, with many arguing that the current process compromises legitimate safety concerns. Several of these commenters stated that the FMLA fitness for duty provision “conflicts with that permitted under the ADA,” with the latter allowing both more substantive information and physical examinations. National Coalition to Protect Family Leave, Doc. 10172A, at 50; see also Fisher & Phillips LLP, Doc. 10262A, at 17–18 (“Employers must be permitted to verify FMLA leave and fitness for duty in the same way they currently verify other absences due to illness.”). An employer's association that commented on the different standards under the ADA and the FMLA stated that, “an employer is more aware of the inherent duties of a job than the employee's health care provider. Yet [under the FMLA], the employer may not delay the employee's return to work while contact with the health care provider is being made.” Employers Association of New Jersey, Doc. 10119A,

at 8–9. This commenter suggested that the Department adopt the reasonable belief standard used under the ADA so that employers could seek fitness for duty certifications for FMLA leave in all instances, and using the same processes, permitted by the ADA. *Id.*

Several commenters representing employees cautioned that altering the fitness for duty certification procedures under the FMLA would place an “unwarranted burden” on employees. See, e.g., National Partnership for Women & Families, Doc. 10204A, at 23. For a fuller discussion of employee comments relating to this issue, see Chapter VI.

D. Offering Light Duty, Modified Work, or Transfers/Reassignments Under the FMLA and the ADA

One of the qualifying reasons for medical leave under the FMLA is for an employee's own serious health condition. The FMLA implementing regulations provide that an employee is entitled to leave under this provision “where a health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of” the ADA and the EEOC's regulations. 29 CFR 825.115.¹⁷ The regulations prohibit employers from modifying an employee's job functions to preclude the taking of FMLA leave. 29 CFR 825.220(b)(2), see also 825.702(d)(1). The FMLA permits the temporary reassignment of employees needing intermittent or reduced schedule leave “that is foreseeable based on planned medical treatment” under certain circumstances. See 29 U.S.C. 2612(b)(2).

Under the ADA, an employer must provide reasonable accommodation, including job restructuring, to qualified individuals with disabilities. See 42 U.S.C. 12111(9); 29 CFR 1630.2(o). Under EEOC Enforcement Guidance, an employer is not required to eliminate an “essential function” of a position, but may do so if it wishes. “This is because an individual who is unable to perform the essential functions, with or without reasonable accommodation, is not a “qualified” individual with a disability within the meaning of the ADA.” See EEOC Reasonable Accommodation

Guidance, General Principles Section. Moreover, the employer has the “ultimate discretion” to choose among reasonable accommodations as long as the chosen accommodation is effective. EEOC Reasonable Accommodation Guidance, at Question 9. In certain situations, employers must offer light duty or reassignment to qualified individuals with disabilities as a reasonable accommodation. See, e.g., EEOC, Enforcement Guidance: Workers' Compensation and the ADA (hereafter, “EEOC Workers' Compensation Guidance”), at Questions 27 and 28 (discussing employer's obligation to provide light duty work); EEOC FMLA and ADA Fact Sheet, at Question 13 (discussing employer's obligation to reassign employee to vacant position).

A number of commenters discussed the different treatment afforded modified work, light duty, and transfers/reassignments under the FMLA and the ADA. While commenters sometimes used these terms interchangeably, this Chapter treats each issue separately. This is because each may impose different obligations and restrictions on employers under the ADA and the FMLA. Thus, for the Department's purposes, the discussion of modified job duties generally refers to situations where an employer wishes to modify an employee's job duties in his or her existing job, and particularly to the suggestion by commenters that employers should be permitted to remove one or more essential job functions in lieu of providing FMLA leave. The discussion of the treatment afforded “light duty” under the FMLA and ADA refers to particular positions created specifically for the purpose of providing work for employees who are unable to perform some or all of their normal duties. It is important to note, however, that the term “light duty” also is used by some employers to refer to situations whereby employees are excused from performing certain job functions of their normal job or are assigned to any less demanding position. The discussion below concerning transfers or reassignments is intended to cover those situations whereby an employer reassigns an employee to an alternative position, which need not be, and often is not, part of the employer's “light duty” program.

1. Modifying Job Duties

The FMLA regulations prohibit employers from “changing the essential functions of [the employee's] job in order to preclude the taking of leave.” 29 CFR 825.220(b)(2). Many employers expressed support for changing the regulations to allow “an employer to

¹⁷ As discussed later in this chapter, the Department received comments suggesting that the Department's regulation is inconsistent with the ADA. Under the ADA, an employee is entitled to reasonable accommodation only if he or she has a covered disability and is qualified to perform (with or without an accommodation) all of the essential functions of his or her position. Only those physical or mental impairments that “substantially limit” one or more major life activities are covered disabilities under the ADA.

modify an employee's job duties in his/her existing job—including removal of essential job functions—in lieu of FMLA leave." National Coalition to Protect Family Leave, Doc. 10172A, at 36 (emphasis in original); *see also* College and University Professional Association for Human Resources, Doc. 10238A, at 9 (allowing modification of job duties in employee's existing job allows for "greater flexibility to meet staffing needs"); National Retail Federation, Doc. 10186A, at 14–15 ("return[ing] an associate with a non-occupation illness or injury to work in a manner that is consistent with restrictions is not unfriendly to the employee and is consistent with the statutory intent of FMLA"); DST Systems Inc. Doc. 10222A, at 3 ("Modifications enable an employee to continue work and avoid the need for FMLA leave, thus eliminating the burden on fellow employees and the employer, and loss of active employment for the employee"). These commenters suggested that "an employee who can perform an essential function with an accommodation, or by virtue of the elimination of that task for the period he or she is unable to perform it, should not be permitted to reject the accommodation and pursue FMLA leave. This result is contrary to the legislative intent of FMLA, which was passed to protect employees who had to miss work rather than employees who merely chose to miss work because they prefer to avoid it." National Association of Convenience Stores, Doc. 10256A, at 2–3; *see also* Fisher & Phillips LLP, Doc. 10262A, at 6 (same).

Commenters supporting this view argued that "[a]llowing this would benefit both employers and employees. The more options employees have to remain at work, the less likely they are to exhaust their leave rights and, more importantly, their rights to reinstatement." National Coalition to Protect Family Leave, Doc. 10172A, at 36–37. A number of employers felt that requiring modified work would be particularly helpful in situations where the "employee has requested intermittent leave to be taken on an unplanned, unscheduled basis." Bendix, Doc. 10079A, at 8; *see also* The Retail Industry Leaders Association, Doc. 10259A, at 3–4 (same); Detroit Medical Center, Doc. 10152A, at 3 (same). A university employer stated that allowing an employer to modify essential functions of an employee's job may be a better alternative than placing the employee on leave, as it allows the employer "greater flexibility to meet staffing needs, while also providing the

employee with protections. It also would better rationalize the FMLA with accommodation provisions of the [ADA] and the light duty provisions of workers' compensation laws." Temple University, Doc. 10084A, at 8–9; College and University Professional Association for Human Resources, Doc. 10238A, at 9 (same). As one law firm noted, "[a]n employee at work performing his or her job is certainly preferable to their not being at work at all. This option would also benefit employees to the extent that they would now have the opportunity to continue receiving pay." Fisher & Phillips LLP, Doc. 10262A, at 11.

A group representing 5,000 physicians and other health care professionals specializing in the field of occupational and environmental medicine stated that employers should be "encouraged in the FMLA to assist the employee to consider alternatives for a better health solution than taking time off from work." The American College of Occupational and Environmental Medicine, Doc. 10109A, at 2. Another commenter noted it could not see any "negative effect" to allowing an employer to alter the essential functions of an employee's job but thought it was unlikely that "most employers would ever take this opportunity, as most are loathe to concede that essential functions may not really be essential." Kennedy Reeve & Knoll, Doc. 4763A, at 12.

A number of employee organizations expressed concern about any change to the FMLA scheme that would require employees to accept an employer's offer of modified work in lieu of leave. As the National Partnership for Women and Families stated:

One bedrock principle of the FMLA is the right of an eligible employee to take a specified amount of leave for family or medical reasons and then return to the same or equivalent job. To the extent the RFI is considering a change in the regulations to require an employee to accept an employer's offer to make modifications to the employee's existing job to accommodate a serious health condition, we believe such a change would be inconsistent with the express language and intent of the FMLA. We also would oppose any effort to penalize an employee who declined to accept such a position, except as currently permitted by law. The law entitles eligible employees to take up to twelve weeks of family or medical leave, and nothing in the statute, regulations, or legislative history suggests that an employee should lose the right to determine whether or not to take leave if an employer modifies the employee's job duties.

National Partnership for Women & Families, Doc. 10204A, at 16; Families USA, Doc. 10327A, at 5; *see also* American Federation of Labor and

Congress of Industrial Organizations, Doc. R329A, at 35 ("[N]either the statute nor the regulations provides a basis for treating a modified position as the equivalent of FMLA leave. An employee who accepts a modified job does not forfeit his or her entitlement to a full 12 weeks of leave if the employee remains unable to perform the essential functions of the unmodified job.').

Some employers also expressed concern about the implications of eliminating essential job functions. A state employer, who opposed any requirement that employers modify essential job functions under the FMLA, expressed concern that such a proposal would not be cost effective, require significantly more documentation, and cause "further confusion" between the FMLA and the ADA. The Commonwealth of Pennsylvania, Doc. 10042A, at 2; *see also* The Pennsylvania Turnpike Commission, Doc. 10092A, at 5 (permitting employers to modify existing job duties would "add to the existing confusion of FMLA and [ADA] regulations"). Another state employer thought that it would be "unduly burdensome to require employers to also modify job duties for employees with serious health conditions" because employers already were legally obligated to provide modified work under workers' compensation laws and the ADA. City of Portland, Office of Management and Finance, Doc. 10161A, at 5. A business organization in Northern Kentucky did not believe that permitting an employer to change the essential functions of a job would be of "significant value." Northern Kentucky Chamber of Commerce, Doc. 10048A, at 4–5. This organization felt that permitting such a practice would likely add increased administrative burdens, cause further conflict between the ADA and the FMLA, and require increased communications with supervisors to ensure that all assigned work met the employee's restrictions, among other issues. *See id.* at 4–5; *see also* National Business Group on Health, Doc. 10268A, at 5 ("implications of modifying an employee's job duties include higher budgeted costs, peer dissatisfaction, and the administrative difficulty of moving an employee to a temporary position"); Elaine G. Howell, H.R. Specialist, International Auto Processing, Inc., Doc. 4752, at 3 (modifying an employee's existing job duties would allow employees to collect the same pay and benefits while no longer doing an equivalent job and cause employees to provide their physicians "with reasons why they

could not do the most disliked portion of their jobs”).

A health system consisting of multiple hospitals in the Washington, D.C., metropolitan area expressed concern that modifying one or more essential job functions in lieu of providing leave under FMLA might mean that an employer would be required to modify those same functions as a reasonable accommodation under the ADA, when it otherwise would not be required to do so.

In keeping with the approach under the [ADA] that essential job functions need not be modified in order to accommodate an employee's disability, such modifications should not occur to accommodate an employee's serious health condition under the FMLA. Both laws serve an important purpose in accommodating employees for the ultimate objective of having them perform the essential job functions. Thus, nothing should detract from determinations made regarding the essential job functions as necessary and central to a job position. Additionally, it is important to note that if employers modify essential job functions for FMLA purposes, they have potentially obligated themselves to doing so under the ADA.

MedStar Health, Inc., Doc. 10144A, at 14–15. As another employer noted, removing essential job functions for FMLA purposes “could lead to an argument that these functions are not that essential, and that the employer should be required to remove them from the position's job duties altogether as an accommodation” under the ADA. Washington Metropolitan Area Transit Authority, Doc. 10147A, at 4; *see also* Madison Gas and Electric Company, Doc. 10288A, at 3 (“An employer may be hesitant to modify an employee's existing job duties due to the implications of the [ADA].”). The health care employer felt that “[t]his would be an undesirable result for employers seeking to reasonably facilitate and manage ADA-related job accommodations.” MedStar Health, Inc., Doc. 10144A, at 14–15. Another company, Zimbrick, Inc. stated the following:

Because FMLA and ADA overlap, modifying existing job duties essentially creates a temporary accommodation which could become permanent. From a business perspective, why would we want to pay an employee performing only part of the essential functions the same as someone who performs all of them?

Doc. FL125, at 1.

The EEOC also stated that “such an alteration to the FMLA rule could raise new ADA issues related to essential functions and reasonable accommodation.” United States Equal Employment Opportunity Commission,

Doc. 10234A, at 3. In its comments, the EEOC acknowledged that the ADA permits, but does not require, an employer to modify or remove essential job functions. The Commission noted, however, that it has not yet provided guidance on “whether an employer's reasonable accommodation duty [under the ADA] could be satisfied by reallocating essential functions with the express purpose of precluding leave as a reasonable accommodation.” *Id.*

2. Offering Light Duty Work

A number of organizations also commented on the differences between the FMLA's and ADA's treatment of light duty work. Section 825.220(d) of the FMLA regulations provides that an employee may voluntarily accept a “light duty” assignment while recovering from a serious health condition, but cannot be coerced to do so. When an employee accepts a light duty assignment, the time spent working in the light duty position does not count against his or her FMLA leave entitlement. Under the FMLA, the employee's right to be restored to the same (or equivalent) position held prior to the start of the leave, however, expires after a cumulative period of 12 weeks of leave and light duty work. 29 CFR 825.220(d); *see also* Wage and Hour Opinion Letter FMLA–55 (March 10, 1995). By contrast, under the ADA, an employer does not have to create a light duty position for an individual with a disability but, if a vacant, light duty position already exists, the employer must reassign the individual with a disability to the position if there is no other effective accommodation available and the reassignment would not pose an undue hardship. *See* EEOC, Workers' Compensation Guidance, at Questions 27 and 28. In addition, if the only effective accommodation available is similar or equivalent to a light duty position, an employer must provide that accommodation, absent undue hardship. *See* EEOC, Workers' Compensation Guidance, at Question 27.

Nearly all respondents to a survey conducted by a human resource association in Ohio “believed employees requesting leave for their own serious health conditions should be required to accept light duty work consistent with their medical restrictions, if offered.” Miami Valley Human Resource Association, Doc. 10156A, at 6–7. The National Association of Convenience Stores, the U.S. Chamber of Commerce, the Society for Human Resource Management, the College and University Professional Association for Human Resources, and

others agreed. *See* National Association of Convenience Stores, Doc. 10256A, at 2–3; U.S. Chamber of Commerce, Doc. 10142A, at 11; Society for Human Resource Management, Doc. 10154A, at 9; College and University Professional Association for Human Resources, Doc. 10238A, at 9; American Bakers Association, Doc. R354A, at 4; American Hotel & Lodging Association, Doc. R366A, at 3; National Public Employer Labor Relations Association, Doc. R358A, at 8. Employers who supported this proposal believed that “[i]n many cases, light duty may be a better alternative than placing the employee on leave, as it allows the employer greater flexibility in meeting its staffing needs. Such a change also would better rationalize the FMLA with the accommodation provisions of the [ADA] and the light duty provisions of many workers' compensation laws.” College and University Professional Association for Human Resources, Doc. 10238A, at 9. Other commenters stated that it “is unnecessary, and often ill-advised, to allow an employee to refuse light duty * * * Experience has shown that employees with minor injuries generally recover more quickly if they are working, gradually returning to their former capabilities.” Society for Human Resource Management, Doc. 10154A, at 9; *see also* The Retail Industry Leaders Association, Doc. 10259A, at 3–4 (same).

Several employers supporting mandatory light duty work thought that such work should count against an employee's 12-week FMLA entitlement. *See* National Association of Convenience Stores, Doc. 10256A, at 2–3; Fisher & Phillips LLP, Doc. 10262A, at 6; American Bakers Association, Doc. R354A, at 4 (Department should clarify that “time spent in light duty work away from the employee's usual job counts against the 12 weeks of FMLA entitlement for all purposes”). As one employer noted, “light duty should count against an employee's FMLA leave entitlement and reinstatement rights. Otherwise, the employer ends up essentially making reasonable accommodations for FMLA even if the condition is not an ADA-qualifying disability.” Sally L. Burnell, Program Director, Indiana State Personnel Department, Doc. 10244C, at 4.

On the other hand, some employers thought light duty should not count against the employee's FMLA leave entitlement. A survey conducted by a national law firm revealed that 66% of the almost 150 individuals who responded on behalf of their companies did not believe that light duty work should be counted against an

employee's FMLA leave entitlement. "The vast majority of respondents felt that light duty is generally the result of a work injury or occupational injury and is better dealt with through the ADA or workers' compensation. Most respondents stated that with light duty, an employee is usually working and therefore not on leave." Hinshaw & Culbertson LLP, Doc. 10075A, at 4; *see also* MedStar Health, Inc., Doc. 10144A, at 14 ("When an employee works, even in an alternate light duty capacity, he/she is not absent under the meaning of the FMLA.").

A number of organizations representing employees also opposed permitting an employer to modify an employee's existing job in lieu of providing leave. *See, e.g.,* American Federation of Labor and Congress of Industrial Organizations, Doc. R329A, at 34 ("treating light duty work as the equivalent of FMLA leave falls squarely" within statutory prohibition making it unlawful to interfere with, restrain, or deny exercise of right to take FMLA leave and conflicts with regulatory provision concerning waiver of FMLA rights). Several of these commenters thought that counting light duty as FMLA leave would be unfair to employees because "[i]f an individual is at work, even if the duties have been modified to address the employee's illness or care giving responsibilities, he or she is still engaging in productive activity for the employer." University of Michigan Center for the Education of Women, Doc. 10194A, at 2; *see also* Families USA, Doc. 10327A, at 4-5 ("opposes any reduction in FMLA leave for time spent working in a "light duty" position."); Coalition of Labor Union Women, Doc. R352A, at 4-5 ("counting "light duty" work as FMLA leave is not appropriate and runs counter to the intent of the statute").

3. Standards for Transferring/ Reassigning Employees

The Department also received comments regarding the differing standards under the FMLA and the ADA for transferring or reassigning employees to alternative positions. The FMLA provisions regarding transfers to an alternative position, discussed more fully in Chapter VIII, generally permit the employer to temporarily transfer an employee who needs foreseeable intermittent or reduced schedule leave for planned medical treatment to an alternative position with equivalent pay and benefits. The position must be one for which the employee is qualified and which better accommodates recurring periods of leave. *See* 29 U.S.C. 2612(b)(2). (See also Chapter IV

discussing unscheduled intermittent leave.). Under the ADA, part-time work or occasional time-off may be a reasonable accommodation. As a general matter, transfer is the accommodation of last resort under the ADA. However, if, or when, an employee's need for part-time work or reduced hours in his or her current position creates an undue hardship for an employer, the employer must transfer the employee to a vacant, equivalent position for which the employee is qualified, unless doing so would present an undue hardship for the employer. If an equivalent position is not available, the employer must look for an equivalent position at a lower level. Further accommodation is not required if a lower level position is also unavailable. *See* EEOC FMLA and ADA Fact Sheet, at Question 13. Employers who place employees in lower level positions are not required to maintain the employee's salary at the level of the higher grade, unless the employer does so for other employees. *See* EEOC Technical Assistance Manual § 3.10.5.

As discussed more fully in Chapter VIII, a number of commenters suggested that the FMLA regulations should be amended so that employers may transfer employees who request unscheduled or unforeseeable intermittent leave. Some commenters supporting reassignment argued that employers should be permitted to temporarily transfer an employee to an alternative position in "all cases involving intermittent leave or reduced leave schedules." United Parcel Service, Doc. 10276A, at 5. Still other commenters suggested that employers should be allowed, in certain circumstances, to permanently reassign employees needing unforeseeable intermittent leave due to a chronic condition. *See* Betsy Sawyers, Director, Human Resources Department, Pierce County, Washington, Doc. FL97, at 4. Many employers that supported reassignment urged that a process similar to that provided under the ADA be adopted, whereby reassignment "could be conditioned on the employer's determination that unscheduled leave could not be continued without jeopardizing the essential functions of the job. After making such a determination, the employer could reassign the employee to a position that better accommodated intermittent attendance." Fairfax County Public Schools, Doc. 10134A, at 3; *see also* National Council of Chain Restaurants, Doc. 10157A, at 10-11 (FMLA should "accommodate employers in a manner similar to the ADA," by permitting the employer to transfer a manager needing unscheduled

intermittent FMLA leave "to a lesser management or a non-management position that better accommodates the employer's needs"). As one employer stated, this approach "would provide employers with more flexibility in accommodating the employee's need for leave while enabling the employer to better manage the workforce." Exelon, Doc. 10146A, at 8.

A law firm suggested that employers also be permitted to reduce the employee's pay and benefits upon transfer, as is permitted for reassignments under the ADA. *See* Pilchak Cohen & Tice, P.C., Doc. 10155A, at 12.¹⁸ Another commenter also recommended that the employer "be allowed to adjust the employee's compensation and benefits so that they are commensurate with the position into which the employee is being moved." National Council of Chain Restaurants, Doc. 10157A, at 10-11. The law firm supporting this approach explained that, otherwise, the provisions for transferring employees under the FMLA are "inherently unrealistic" because the "employee would always prefer to be transferred to a position with less responsibilities and less duties, but with equal pay and benefits." Pilchak Cohen & Tice, P.C., Doc. 10155A, at 12.

E. Permitting "Reasonable Leave for Medical Reasons" Under the FMLA and the ADA

An employee is entitled to reasonable accommodation, including medical leave, under the ADA only if he or she has a covered disability and is qualified to perform (with or without an accommodation) the essential functions of the position. 42 U.S.C. 12112(b)(5)(A); *see generally* EEOC Reasonable Accommodation Guidance. Only those physical or mental impairments that "substantially limit" one or more major life activities are covered disabilities under the ADA. *See* 42 U.S.C. 12102(2)(A). Moreover, an employer is not required to provide any accommodation that would pose an "undue hardship" on the operation of the employer's business. *See* 42 U.S.C. 12112(b)(5)(A); 29 CFR 1630.9. "Undue hardship" means significant difficulty or expense and refers not only to financial difficulty, but also to requested accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter

¹⁸ While the FMLA permits the temporary reassignment of employees needing intermittent or reduced schedule leave "that is foreseeable based on planned medical treatment" under certain circumstances, the statute expressly requires that the alternative position have equivalent pay and benefits. 29 U.S.C. 2612(b)(2).

the nature or operation of the business. See 42 U.S.C. 12111(10); 29 CFR 1630.2(p). An employer also is not required to eliminate an essential function of an employee's position when providing accommodation under the ADA. See generally EEOC Reasonable Accommodation Guidance.¹⁹

One of the stated purposes of the FMLA is to permit employees to take reasonable leave for medical reasons "in a manner that accommodates the legitimate interests of employers." 29 U.S.C. 2601(b). The statute entitles employees to FMLA leave for (among other qualifying reasons) a serious health condition that makes them unable to perform the functions of their position. See 29 U.S.C. 2612(a)(1)(D). The FMLA implementing regulations adopt the ADA "essential function" concept in explaining when an eligible employee is entitled to leave for his or her own serious health condition. Under section 825.115, leave may accrue to an eligible employee "where a health care provider finds that the employee is unable to work at all or is unable to

perform any one of the essential functions of the employee's position." 29 CFR 825.115. Other provisions of the FMLA allow an employee to take leave intermittently or on a reduced schedule. See 29 U.S.C. 2612(b); 29 CFR 825.203–825.205. Unlike the ADA, however, neither the FMLA regulations nor the statute limits the availability of such leave to situations where the employee's absence does not impose an "undue hardship" on the employer.

A number of commenters believed that the FMLA regulations should be revised to incorporate the ADA concept of "substantially limited" in working. As a group of human resource professionals stated:

The Act seems to suggest that an employee is only entitled to FMLA leave for a serious health condition when the condition makes the employee totally unable to work. The Regulations have gone one step further and state that an employee is entitled to FMLA leave if he/she is unable to perform just one essential job function. * * * Employees should only be able to take FMLA leave if they are substantially limited in their ability to perform essential job functions.

South Central Human Resource Management Association, Doc. 10136A, at 18; see also Baldor Electric Company, Doc. 10320A, at 2 (leave should only be allowed when a person cannot perform the majority of the essential functions). According to another employer, "the current regulatory framework allows for leave when an employee is unable to perform only one essential function of his or her job, even if there are ten other essential functions of the job that the employee is able to perform. This conflicts with the provisions of the [ADA]." Verizon, Doc. 10181A, at 7.²⁰

Commenters also routinely contrasted an employer's ability to manage absenteeism under the FMLA and the ADA, particularly in situations where an individual takes unscheduled intermittent leave. A law firm representing employers summarized the inconsistencies between the two statutes:

The [FMLA] Regulations clearly state that the ADA definition of "essential job functions" is to be used under the FMLA. 29

CFR 825.115. Although attendance is an essential job function under well-established ADA case law, the Regulations ignore the case law and permit employees to maintain unacceptable attendance records on a permanent basis. In fact, the FMLA Regulations permit employees with permanent chronic conditions to be absent with impunity for approximately 25% of a work year. * * * The ADA, on the other hand, does not protect an employee with a disability who cannot maintain an acceptable attendance record.

The courts have consistently and uniformly held that attendance is an essential job function and that a continuous or reduced schedule leave of a reasonable duration are reasonable accommodations under the ADA. * * *. [T]he FMLA was intended to cover a temporary emergency or critical need for medical leave, not a permanent non-emergency or non-critical need for medical leave.

Spencer Fane Britt & Browne LLP, Doc. 10133C, at 9; see also South Central Human Resource Management Association, Doc. 10136A, at 13 (noting inconsistency between ADA and FMLA treatment of attendance and stating that FMLA regulations "permit chronic absenteeism problems whereas the ADA does not"); United States Postal Service, Doc. 10184A, at 24 ("Pursuant to the ADA, an employer is not required to accommodate chronic absenteeism or allow employees to work on a part-time schedule while encumbering a full-time position. Yet the FMLA requires an employer to do just that."); Association of Corporate Counsel, Doc. FL31, at 2–3 (suggesting, when discussing employer's ability to control absenteeism under FMLA, that "current regulations protect employee behavior that the Federal Courts and the EEOC have concluded is not only unreasonable but also inconsistent with the essential needs and expectations of employers"). For a full discussion of comments regarding the impact of unscheduled intermittent leave on attendance, see Chapter IV.

To address these concerns, a significant number of employers and organizations representing employers suggested that intermittent or reduced schedule medical leave should not be required under the FMLA when it presents an "undue hardship" or means that the employee cannot perform the essential functions of the position, as would be the case under the ADA.

[P]rovisions could be added to the FMLA and its regulations to take into account the impact of intermittent leave on the employer. The ADA utilizes reasonableness and undue hardship standards when assessing employee requests for accommodations. Under the ADA, an employer is not required to fundamentally alter the nature of a position in order to accommodate an employee's

¹⁹The EEOC has stated that "in some instances, an employer's refusal to modify a workplace policy, such as a leave or attendance policy, could constitute disparate treatment as well as a failure to provide a reasonable accommodation." EEOC Reasonable Accommodation Guidance, at Question 24. Numerous court decisions have held that the ADA does not protect individuals who have "erratic, unplanned absences." *EEOC v. Yellow Freight Sys., Inc.*, 253 F.3d 943, 948 (7th Cir. 2001) ("our court, and every circuit that has addressed this issue has held that "in most instances the ADA does not protect persons who have erratic, unexplained absences, even when those absences are a result of a disability. The fact is that in most cases, attendance at the job site is a basic requirement of most jobs."); accord *Brenneman v. MedCentral Health System*, 366 F.3d 412 (6th Cir. 2004); *Mason v. Avaya Communications, Inc.*, 357 F.3d 1114 (10th Cir. 2004); *Nesser v. Trans World Airlines, Inc.*, 160 F.3d 442, 445 (8th Cir.1998); *Hypes v. First Commerce Corp.*, 134 F.3d 721 (5th Cir.1998); *Lyons v. Legal Aid Soc'y*, 68 F.3d 1512, 1516 (2d Cir.1995); *Tyndall v. Nat'l Educ. Ctrs.*, 31 F.3d 209, 213 (4th Cir.1994); *Carr v. Reno*, 23 F.3d 525, 530 (D.C. Cir.1994); cf. *Nesser v. Trans World Airlines, Inc.*, 160 F.3d 442, 445 (8th Cir.1998); *Hypes v. First Commerce Corp.*, 134 F.3d 721 (5th Cir.1998); *Lyons v. Legal Aid Soc'y*, 68 F.3d 1512, 1516 (2d Cir.1995); *Tyndall v. Nat'l Educ. Ctrs.*, 31 F.3d 209, 213 (4th Cir.1994); *Carr v. Reno*, 23 F.3d 525, 530 (D.C. Cir.1994); cf. *Humphrey v. Memorial Hospitals Ass'n*, 239 F.3d 1128 (9th Cir. 2001) (noting "that although excessive or unscheduled absences may prevent an employee from performing the essential functions of his job and thereby render him not otherwise qualified for purposes of the ADA, regular and predictable attendance is not per se an essential function of all jobs"); *Ward v. Mass. Health Research Inst.*, 290 F.3d 29 (1st Cir. 2000) (while "regular and reliable schedule may be an essential element of most jobs, resolution of the issue in each case requires a fact-intensive inquiry into the pattern of the attendance problem and the characteristics of the job in question"); see also *David v. Florida Power & Light Co.*, 205 F.3d 1301 (11th Cir. 2000) (holding that overtime, like job presence, can be an essential function of a job).

²⁰In the process of finalizing the FMLA implementing regulations, the Department received comments questioning whether section 825.115 was intended to mean that an eligible "employee must be found unable to perform each and every essential function (i.e. all), or only any single one, or some of several of the essential functions" in order to take FMLA leave due to his or her own serious health condition. The Department made clear in the preamble to its Final Rule that "[t]his section was intended to reflect that an employee would be considered "unable to perform the functions of the position" * * * if the employee could not perform any one (or more) of the essential functions." 60 FR 2179, 2196 (Jan. 6, 1995).

disability. The FMLA and its regulations should include similar considerations. An employer should not be required to grant a request for intermittent leave if the request fundamentally alters the nature of the employee's position (i.e., effectively changes the start or end time for the position, allows the employee to excuse himself/herself from work without notice, excuses the employee from performing essential duties, excuses the employee from the requirement to work overtime, etc.). An employer should not be required to grant a request for intermittent leave if there is no reasonable way to cover the employee's work duties (e.g., because of the nature of the position; because the employee cannot provide reasonable advance notice of the leaves; because the leaves are frequent).

University of Minnesota, Doc. 4777A, at 3; *see also* National Retail Federation, Doc. 10186A, at 11 ("One suggestion is that intermittent leave should not be required where the unpredictable or short-term nature of the absences impose undue hardship or mean that the employee cannot perform the essential functions of the job."); National Council of Chain Restaurants, Doc. 10157A, at 10 ("same defenses available under the ADA [e.g., undue hardship] should be available" when employee is unable to perform essential functions); Texas Parks and Wildlife Department, Doc. 10253A, at 1 (allow employers to consider business necessity when intermittent leave extends beyond one year or 480 hours of leave); International Public Management Association for Human Resources and International Municipal Lawyers Association, Doc. R350A, at 3 (summarizing survey of local, state, and federal government employers, including respondent's suggestion that "an ADA-type exception be made if the need for intermittent leave will pose an undue hardship on the employer"). One commenter suggested that amending the FMLA to include "undue hardship" and "direct threat" defenses would import the "important balance between employee and employer rights found in the ADA" to the FMLA and make the two laws better integrated. Pilchak Cohen & Tice, P.C., Doc. 10155A, at 18.

While not specifically addressing the inclusion of an "undue hardship" defense under FMLA, several commenters representing employees indicated that they "strongly oppose any reconsideration of the FMLA that would serve to limit FMLA's scope or coverage." American Federation of State, County and Municipal Employees, Doc. 10220A, at 1. A membership organization affiliated with the AFL-CIO expressed concern about the impact "scaling back" FMLA protections would have. They noted

that, at each FMLA workshop they conducted, "attendees repeatedly told us that, without the protections offered by the FMLA, many would have been out of work and without crucial healthcare benefits, due to their employers' very strict absence policies." Coalition of Labor Union Women, Doc. R352A, at 2. The National Partnership for Women & Families, while acknowledging that "situations involving unscheduled leave may present unique challenges for both employees and employers," argued that limiting the availability of unscheduled leave "would be inconsistent with the very purpose of the FMLA" which provides for unscheduled leave because "it is impossible to plan or script every situation where family or medical leave is needed." Doc. 10204A, at 12.

VIII. Transfer to an Alternative Position

The RFI did not specifically ask questions about an employer's ability to transfer an employee to an "alternative position" but the Department received many unsolicited comments on this topic. Under the Act, an employer may transfer an employee to an "alternative position" with equivalent pay and benefits when the employee needs to take intermittent or reduced schedule leave "that is foreseeable based on planned medical treatment[.]" 29 U.S.C. 2612(b)(2). This statutory provision was intended "to give greater staffing flexibility to employers by enabling them temporarily to transfer employees who need intermittent leave or leave on a reduced leave schedule to positions more suitable for recurring periods of leave. At the same time, it ensures that employees will not be penalized for their need for leave by requiring that they receive equivalent pay and benefits during the temporary transfer." 60 FR 2180, 2202 (Jan. 6, 1995).

Section 825.204 of the regulations explains more fully when an employer may transfer an employee to an alternative position in order to accommodate intermittent leave or a reduced leave schedule. Section 825.204(a) sets the general parameters for the transfer: "If an employee needs intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment for the employee or a family member, * * * the employer may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position." 29 CFR 825.204(a).

Section 825.204(d) prohibits an employer from "transfer[ing] the employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee." Section 825.204(e) limits the length and circumstances of the transfer: "When an employee who is taking leave intermittently or on a reduced leave schedule and has been transferred to an alternative position, no longer needs to continue on leave and is able to return to full-time work, the employee must be placed in the same or equivalent job as the job he/she left when the leave commenced. An employee may not be required to take more leave than necessary to address the circumstance that precipitated the need for leave." 29 CFR 825.204(e). Unlike a "light duty" assignment under section 825.220 of the regulations, a transfer to an alternative position does not require the employee's consent. *Cf.* 29 CFR 825.220(d) (light duty) ("[Regulations do] not prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a 'light duty' assignment while recovering from a serious health condition[.]").

A. Department's Regulations Only Permit Transfer Where Employee Needs Intermittent Leave or Leave on a Reduced Leave Schedule That Is Foreseeable Based on Planned Medical Treatment.

A significant number of commenters questioned why the regulations permit an employer to transfer an employee only when the employee's need for leave is foreseeable based on planned medical treatment as opposed to a chronic need for unforeseeable leave. These stakeholders noted as an initial matter that the statute is silent on the issue. "We recognize that while the statute allows an employer to transfer an employee taking intermittent or reduced schedule leave for planned medical treatment, * * * it is silent on taking unforeseeable intermittent leave or foreseeable leave unrelated to treatment." Seyfarth Shaw LLP (on behalf of a not-for-profit health care organization), Doc. 10132A, at 3. It is the regulations, commenters contended, that prohibit a transfer in the unforeseeable intermittent context. "As presently drafted, § 825.204 only permits employers to transfer an employee to an alternative equivalent position where the employee's need for intermittent leave is 'foreseeable based on planned medical treatment.'" United Parcel Service, Doc. 10276A, at 5. "Section 825.204 allows an employer to transfer an employee to an alternative

position where the leave is foreseeable based on planned medical treatment for the employee or a family member.” Seyfarth Shaw LLP (on behalf of a not-for-profit health care organization), Doc. 10132A, at 3. Moreover, Ford & Harrison noted a recent Sixth Circuit case, which stated that the Department’s regulations allow “an employer [to] * * * transfer an employee only when the need for the intermittent leave is foreseeable.” Doc. 10226A, at 6. *See Hoffman v. Professional Med Team*, 394 F.3d 414, 421, n.11 (6th Cir. 2005) (transfer of employee with chronic condition requiring unforeseeable leave likely prohibited by sections 825.204(a), (c), and (d)).

Many commenters saw no practical basis for differentiating between foreseeable and unforeseeable need for leave in this context. “We do not see any basis for distinguishing between foreseeable vs. unforeseeable leaves for purposes of such temporary transfers.” United Parcel Service, Doc. 10276A at 5. Similarly, another commenter stated:

[Section 825.204 provides n]o similar option * * * for employers to transfer or otherwise alter the duties of an employee who needs unscheduled or unforeseeable intermittent leave. Even if the employee’s unscheduled intermittent absences may result in substantial safety risks to the public or co-employees, or could cause serious disruption to the operations of the employer, such employee’s duties or position cannot be altered as a result of the unscheduled intermittent leave.

The Southern Company, Doc. 10293A, at 3. Another company echoed the same concern that under the current regulatory scheme “[e]mployers do not have [the option] to transfer or otherwise alter the duties of an employee who needs unscheduled or unforeseeable intermittent leave.” Edison Electric Institute, Doc. 10128A, at 6.

In fact, many employers reported that the underlying rationale for the transfer provision—to provide “greater staffing flexibility” while maintaining the employee’s same pay and benefits—is best served where the employee’s need for leave is unforeseeable. “[I]f there is to be such a distinction, then a strong argument can be made that the DOL and Congress got it exactly backwards. Indeed, it is much easier for employers to arrange temporary coverage of an employee’s normal job duties where the intermittent leaves occurs on a regular and foreseeable schedule, than it is to accommodate an employee with a chronic condition with unforeseeable flare-ups[.]” United Parcel Service, Doc. 10276A, at 5. Other commenters agreed:

Employers report that it is most often the employees whose intermittent or reduced leave schedule is unforeseeable who cause the most disruption in the workplace. For example, an employee works on an assembly line in a factory that runs on a 24-hour basis in three shifts. The employee has been approved to take intermittent leave to accommodate migraines and has been calling in sick on a relatively frequent, but unforeseeable basis (e.g., approximately three times a month), giving only about an hour notice before the start of his shift. Good attendance is essential to this position because an absence can hold up the entire production line.

Ford & Harrison LLP, Doc. 10226A, at 6. “The most complicated part of intermittent leave * * * occurs with unplanned intermittent leave * * * [A]ccommodating late arrivals or even early departures to satisfy the requirements of an intermittent leave can create problems in the workplace, including overburdening other workers and creating a sense of inequity and frustration.” Leonard, Street and Deinard, Doc. 10330A, at 2.

Other commenters criticized the entire idea of “alternative positions” as unrealistic and/or problematic. For example, one law firm stated that “alternative positions” are a fiction:

Alternative positions do not exist in the real world. [The regulations] provide that in a reduced schedule situation, “an [employer] may assign an employee to an alternate position with equivalent pay and benefits that better accommodate the employee’s intermittent or reduced leave schedule.” * * * When this provision is pointed out, the overwhelming majority of employers I work with just laugh. Employers simply do not have “alternative positions” hanging around which they can simply slot someone into. Most FMLA-covered companies are small and medium sized. They do not have hundreds of positions. This was a regulatory provision written without understanding of the real world. Real companies are trying to run lean. They do not [have], and cannot afford to create, an extra position which is not needed. So, the “alternative position” provision is generally useless.

Boardman Law Firm, Doc. FL4, at 2. Even where an alternative position exists to which an employee on intermittent leave may be assigned, problems can arise. “Employees on unpredictable intermittent leave who have been placed in lower-level positions on a temporary basis can degrade morale of other employees in the same positions. The other employees in the same positions may earn lower wages than the employees on FMLA leave, but those other employees are held to higher attendance standards, absent their own need for FMLA leave.” North Dakota Society for Human Resource Management State Council,

Doc. FL90 at 3. “[T]he regulation that permits an employer to transfer an employee to another position which better accommodates the intermittent leave is inherently unrealistic. Is there any doubt that an employee would always prefer to be transferred to a position with less responsibility and less duties, but with equal pay and benefits? And, would an employee placed into such a position of equal pay and benefits, but with less responsibilities and duties, have any motivation to get better?” Pilchak Cohen & Tice, P.C., Doc. 10155A, at 12.

B. Recommendations From the Regulated Community

Most stakeholders who submitted comments on this subject agreed that the regulations should be revised to permit employee transfers in the case of either foreseeable or unforeseeable leave: “This section should be amended to permit the transfer to an alternative position for unforeseen intermittent absences or foreseen intermittent absences unrelated to medical treatment. * * * In the absence of such an amendment, prohibiting such transfers often creates undue hardship to our organization’s ability to provide patient care or other services and does not further the purposes of the FMLA.” Seyfarth Shaw LLP (on behalf of a not-for-profit health care organization), Doc. 10132A, at 3. “The FMLA regulations should be clarified to ensure that the employer may transfer the employee to a position that better accommodates an unforeseeable intermittent leave schedule.” Ford & Harrison LLP, Doc. 10226A, at 6. “DOL should revise § 825.204 to permit temporary transfer in all cases involving intermittent leave or reduced leave schedules.” United Parcel Service, Doc. 10276A, at 5. “Section 825.204 should be modified to allow an employer to transfer an employee who requires unscheduled intermittent leave to an alternative position with equivalent pay and benefits or to otherwise alter such employee’s job duties (e.g., assign to another shift) in order to better accommodate the periods of intermittent leave. Such a modification would allow an employer to determine how to best accommodate the employee’s periodic and unforeseen absences to minimize the disruption in the workplace and perhaps avoid a safety risk to others, while at the same time allow the employee to perform the essential functions of the position to the best of his or her ability.” The Southern Company, Doc. 10293A, at 3. “Employers should be provided with greater flexibility to temporarily transfer

employees to positions that better accommodate intermittent and reduced schedule absences.” Taft, Stettinius & Hollister LLP, Doc. FL107, at 3. “The employer should be permitted to move an employee on intermittent leave * * * to another position with the same salary and benefits, if in such a position the leave would be less disruptive. * * * [P]ermitting the employer flexibility to relocate an employee at the same salary and benefits * * * would help to address the difficulties employers have in addressing demands for intermittent leave for chronic illnesses.” Leonard, Street and Deinard, Doc. 10330A, at 2. “[T]he employer should be able to place employees whose restrictions only require some additional rest periods, or less strenuous work, into other slots, without requiring time off.” Indiana Chamber of Commerce, Doc. 10170A, at 3. “Employers should be able to reassign an employee on intermittent leave, without loss to the hourly pay rate or degradation in assignment, to a position schedule that would be more conducive to an intermittent schedule without fear of retaliation claims. Employees would still be returned to the same or similar job assignment at the end of the FMLA leave.” County of Placer, Doc. 10067A, at 3.

Some employers felt the move should be potentially permanent where the employee’s schedule cannot meet the employer’s need:

Where regular and predictable attendance is an essential function of a position, and the employee occupying that position has a chronic medical condition that the physician has determined will never allow regular and predictable attendance, the Employer should be allowed to accommodate that employee by permanently transferring him/her to an alternative position or, if no alternative is available, to separate the employee from the position that requires regular and predictable attendance, even if the employee has not exhausted the 12 weeks of FMLA leave.

Betsy Sawyers, Director, Human Resources Department, Pierce County, Washington, Doc. FL97, at 4. The Fairfax County Public Schools echoed this theme: “[I]t would be helpful if the regulations would allow the employer to reassign the employee after a specified period of unscheduled intermittent leave, such as two or three months. Reassignment could be conditioned on the employer’s determination that unscheduled leave could not be continued without jeopardizing the essential functions of the job. After making such a determination, the employer could reassign the employee to a position that better accommodated intermittent attendance.” Doc. 10134A,

at 3. In a different but related context, Ford & Harrison made the same suggestion: “[An] employee works in [a] position at the * * * factory. The employee sees a posting for an opening for the assembly line position for which good attendance is essential and requests a promotion or transfer to that position. If the employee is otherwise qualified for the position, but for the employee’s attendance issues due to the intermittent FMLA leave, the regulations should be clarified to ensure that the employer be allowed to deny the promotion/transfer without risking a claim of FMLA retaliation or interference with the employee’s FMLA rights on the grounds that the employee’s current position better accommodates an unforeseeable intermittent leave schedule.” Ford & Harrison LLP, Doc. 10226A, at 6.

The Southern Company noted that permitting transfers of employees who need unforeseeable leave would be consistent with the spirit of the FMLA, given the pay and benefits safeguards built into the transfer provision. “All the safeguards that currently exist in Section 825.204 (i.e., equivalent pay and benefits, transfer may not work a hardship on employee, and restoration rights at the end of the necessity of the leave) would be applicable to ensure that the employee’s rights to take FMLA leave will not be deterred in any way. Accordingly, modifying Section 825.204 to encompass intermittent unscheduled leave would be consistent with the FMLA’s stated purpose “to entitle employees to take reasonable leaves for medical reasons * * * in a manner that accommodates the legitimate interests of employers.” The Southern Company, Doc. 10293A, at 3. Edison Electric agreed that this was a reasonable solution under the Act: “Such a modification [to the regulations for unscheduled intermittent leave] would allow an employer to determine how to best accommodate the employee’s periodic and unforeseen absences to minimize the disruption in the workplace and perhaps avoid a safety risk to others, while at the same time allowing the employee to perform the essential functions of the position to the best of his or her ability.” Doc. 10128A, at 7. *But see* Brian T. Farrington, Esq., Doc. 5196, at 1 (“Th[e] [intermittent absence] problem is particularly acute when the employee performs an important or unique function, and repeated absences can put the employer in a very difficult situation. In such a case, transferring the employee to another position * * * doesn’t solve the problem. The

employee is needed in his/her principal position, not some alternative job.”).

On the other hand, some commenters pointed out the potential downside of permitting employers to unilaterally modify jobs. “Allowing employers to modify employee’s job duties to temporarily meet limitations may be acceptable until the employee recovers fully. However, the potential for employer’s modification being sub-par, demoralizing and unfair is very, very high.” An Employee Comment, Doc. 10336A at 26. The AFL–CIO, moreover, encouraged employers to use the tools they currently have to reach a mutually agreeable solution: “We encourage employers to consider whether job modifications will permit employees to remain at the workplace under mutually agreeable arrangements.” Doc. R329A, at 36.

IX. Substitution of Paid Leave

The Department requested input on three issues related to the substitution of paid leave provisions: (1) The impact of the prohibition under section 825.207 on “applying [employers’] normal leave policies to employees substituting paid vacation and personal leave for unpaid FMLA leave[.]” (2) how the “existence of paid leave policies affect[s] the nature and type of FMLA leave used[.]” and (3) whether “employers allow employees to use paid leave such as sick leave to cover short absences from work (such as late arrivals and early departures) for FMLA covered conditions[.]”

Section 102(c) of the Act provides that FMLA leave is, as a general rule, unpaid leave. Section 102(d) addresses circumstances in which an employee may substitute (i.e., use concurrently) accrued paid leave for the unpaid FMLA leave period. *See* 29 U.S.C. 2612(d); 29 CFR 825.207(a). Under this section of the FMLA, an “employee may elect, or an employer may require, the employee to substitute” accrued paid leave for the employee’s FMLA leave. *See* 29 U.S.C. 2612(d)(2); 29 CFR 825.207(a). That is, the law provides employees the option to take their accrued paid leave concurrently with their FMLA leave in order to mitigate their wage loss. If an employee elects not to substitute accrued paid leave, however, the employer has the right to require such substitution. Where either the employee or the employer elects to substitute accrued paid leave, the employee will be entitled to FMLA protection during the period in which paid leave is substituted.

The underlying reason for an FMLA request determines the types of available accrued paid leave that may be substituted. If the requested FMLA leave

is for the birth of a child, placement of a child for adoption or foster care, or to care for a spouse, child or parent who has a serious health condition, employees may choose to—or be required by their employers to—substitute any accrued vacation, personal (including leave available leave under a “paid time off” plan) or family leave (subject to limitations). *See* 29 U.S.C. 2612(d)(2)(A)-(B); 29 CFR 825.207(b), (e).

When employees seek FMLA leave to care for their own or a qualifying family member’s “serious health condition,” accrued paid medical, sick, vacation or personal leave may be substituted. *See* 29 U.S.C. 2612(d)(2)(B); 29 CFR 825.207(c). The substitution of accrued medical/sick leave for FMLA leave is limited to circumstances that meet the requirements of the employers’ existing medical/sick leave policies. *See* 29 U.S.C. 2612(d)(2)(B); 29 CFR 825.207(c). Employers are not required to “provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.” 29 U.S.C. 2612(d)(2)(B). Essentially, employers may maintain medical/sick leave policies distinct and separate from FMLA leave, and will not be required to provide paid leave where the reason for the leave is not covered by their policy (e.g., if the employer’s plan allows the use of sick leave only for the employee’s own condition, the employer is not required to allow an employee taking FMLA leave to care for a child to use sick leave). As the regulations state, “an employee does not have a right to substitute paid medical/sick leave for a serious health condition which is not covered by the employer’s leave plan.” *See* 29 CFR 825.207(c).

The regulations specifically prohibit employers from placing any restrictions or limitations on employees’ accrued vacation or personal leave, however, or any leave earned or accrued under “paid time off” plans. *See* 29 CFR 825.207(e). Additionally, the regulations provide that, if neither the employee nor the employer chooses to substitute paid leave, the employee “will remain entitled to all paid leave” previously accrued or earned. *See* 29 CFR 825.207(f).

The regulations also address how FMLA entitlements are applied when employees qualify for both FMLA leave and payments under a non-accrued paid benefit plan, such as leave provided under a temporary disability or workers’ compensation plan. *See* 29 CFR 825.207(d). Specifically, the regulations provide that when employees are on leave under a short-term disability or workers’ compensation plan, the choice

to substitute paid leave for unpaid FMLA leave is inapplicable, because such benefit plans already provide compensation and the leave therefore “is not unpaid.” *See* 29 CFR 825.207(d)(1)–(2). To the degree that the underlying condition for which the employee is receiving workers’ compensation or short-term disability pay also qualifies as a serious health condition under the FMLA, an employer may designate FMLA leave to run concurrently with the employee’s workers’ compensation or disability leave. *See id.*; *see also Repa v. Roadway Express, Inc.*, 477 F.3d 938, 941 (7th Cir. 2007) (“Because the leave pursuant to a temporary disability benefit plan is not unpaid, the provision for substitution of paid leave is inapplicable. However, the employer may designate the leave as FMLA leave and count the leave as running concurrently for purposes of both the benefit plan and the FMLA leave entitlement.”). If the requirements to qualify for disability plan payments are more stringent than those of the FMLA, the employee may either satisfy the more stringent plan standards or instead choose not to receive disability plan payments and use unpaid FMLA leave or substitute available accrued paid leave. *See* 29 CFR 825.207(d)(1).

Under section 825.207(h), if the employer’s notice or certification procedural standards for taking paid leave are less stringent than the general FMLA requirements and such paid leave is substituted for the FMLA leave, the employee may be required to meet only the less stringent requirements. However, if “accrued paid vacation or personal leave is substituted for unpaid FMLA leave for a serious health condition, an employee may be required to comply with any less stringent medical certification requirements of the employer’s sick leave program.” 29 CFR 825.207(h). Further, where employees comply with the applicable less stringent requirements, employers may not deny or limit FMLA leave. *Id.* Nevertheless, as the preamble to the 1995 Final Rule noted, employers may revise any such less stringent notice or certification requirements so that their paid leave programs correspond to the FMLA requirements, or may treat paid and unpaid leave differently. *See* 60 FR 2180, 2206, Jan. 6, 1995. Comments regarding the effects of these regulatory provisions on employers’ paid leave policies are also discussed in Chapter IX.B.1.

Lastly, the regulations provide that compensatory time off, available to state and local government employees under section 7(o) of the Fair Labor Standards Act (“FLSA”), is not considered a “form

of accrued paid leave.” *See* 29 CFR 825.207(i). Employees may request to take accrued compensatory time in lieu of FMLA leave, but employers may not require its substitution.²¹ If compensatory time is used in lieu of FMLA leave, employers may not count it against employees’ FMLA entitlement. *Id.*

In response to the RFI, the Department received many comments related to the general impact of the substitution of paid leave provisions. The RFI also generated comments on how these provisions interact with employer policies regarding paid leave and other workplace benefits, such as temporary or short-term disability leave, leave under workers’ compensation plans, and collectively bargained leave benefits. Some commenters also addressed the impact of the substitution of leave provisions on the requirements of certain other state and federal laws.

A. General Impact of the Substitution of Paid Leave Provisions

Several employee advocacy groups noted that the ability to substitute paid leave for an otherwise unpaid FMLA leave period is a critical factor in employees being able to utilize FMLA leave. According to these commenters, the substitution of paid leave provisions are “essential to workers’ ability to exercise their rights under the law. Few workers can afford to take extended periods of leave without pay.” *See* Faculty & Staff Federation of Community College of Philadelphia, Local 2026 of the American Federation of Teachers, Doc. 10242A, at 4. *See also* Center for Law and Social Policy, Doc. 10053A, at 3 (same); Service Employees International Union, Local 668 Pennsylvania Social Services Union, Doc. FL105, at 3 (“Permitting workers to use their accrued paid leave as wage replacement * * * makes it possible for them to take time off to address critical family and medical issues.”).

The AFL–CIO also noted that the lack of paid leave “presents a significant obstacle for those who cannot afford to take FMLA leave,” as shown by the 2000 Westat Report, which found that

²¹ “Compensatory time off” is paid time off accrued by public sector employees in lieu of “immediate cash payment” for working in excess of the applicable maximum hours standard of the FLSA. 29 CFR 553.22(a). Compensatory time must be earned at a rate of not less than “one and one-half hours for each hour of employment for which overtime compensation is required by section 7 of the FLSA.” 29 CFR 553.22(b). Police, firefighters, emergency response personnel, and employees engaged in seasonal activities may accrue up to 480 hours of compensatory time, while other public sector employees may accrue up to 240 hours. *See* 29 CFR 553.24.

the most commonly noted reason for not taking leave was inability to afford it. Doc. R329A, at 28–29. The Coalition of Labor Union Women similarly noted that “a disturbing number of workers are unable to take advantage of FMLA leave because it is not paid and they cannot afford to lose time away from paying jobs.” Doc. R352A, at 4. Allowing the substitution of paid leave has “helped many employees cope with personal and family health emergencies,” without which they “would have faced a terrible choice between their health needs and their job security,” while allowing such flexibility “promotes worker morale and productivity.” *Id.* See also International Association of Machinists and Aerospace Workers, Doc. 10269A, at 2; 9to5, National Association of Working Women, Doc. 10210A at 3; National Partnership for Women & Families, Doc. 10204A, at 9–10; Families USA, Doc. 10327A, at 3–4. Moreover, the Coalition of Labor Union Women made the point that, because paid leave is available only when already provided by employers, the employers have already determined that such paid leave “will not have an adverse impact on their business * * * and does not create undue hardships for the employer.” See Doc. R352A, at 4.

The National Business Group on Health similarly stated that allowing paid leave and FMLA leave to run simultaneously both “protects employees’ incomes during periods of serious illness and maximizes the flexibility in the design of employer leave policies.” Doc. 10268A, at 7. The Maine Department of Labor asserted that allowing substitution helps everyone: employees living paycheck-to-paycheck, who “cannot afford to take unpaid leave without risking the loss of housing, heat, food[;]” employers, who would suffer lost productivity if employees continued to work while ill; the public sector, because employees otherwise would have “to rely more and more on public resources to cope[;]” and the health care system, because employees otherwise would work until their condition became worse and more expensive to treat. Doc. 10215A, at 3.

Not all commenters uniformly supported the substitution of paid leave, however. Some employers commented that the substitution of leave provisions contribute to increased FMLA leave at otherwise popular vacation or personal leave times. Another commenter noted that it is not just holidays or high demand periods but that the “employee is more likely to use FMLA leave for the employee’s own serious health condition when the employee is

receiving a paid sick or disability benefit * * * without a financial impact, some employees have little to no incentive to work and actually have an incentive not to work, since the employer cannot discipline them for using job protected FMLA leave[.]” Exelon, Doc. 10146A, at 6. The substitution provisions can thus leave an employer in a quandary: “While some may think the solution is to reduce or eliminate paid sick or disability benefits or to make the standards for receiving such benefits more stringent to avoid FMLA leave abuse, doing so penalizes the vast majority of employees who use sick days or disability benefits only when they are truly unable to work due to illness or injury.” *Id.*

As noted in other chapters of this Report, many commenters discussed the idea that the different treatment experienced by employees based on the type of leave requested may have a substantial effect on employee morale and productivity. A comment from the Indiana State Personnel Department noted that problems arise when employers require substitution of paid leave for FMLA leave. See Doc. 10244C, at 2 (employees who saved and maintained leave balances become angry when forced to use accrued leave as employees “feel they are being penalized for working overtime without taking leave”). While not directly addressing morale concerns, the Ohio Department of Administrative Services noted in a similar vein that some state agencies reported that employees take advantage of FMLA leave only when they had exhausted all of their accrued paid leave and were in jeopardy of disciplinary action. See Doc. 10205A, at 3. Thus, according to the comment, FMLA was used as a last resort when employees no longer had paid time off. In response to the problem, the Ohio Department of Administrative Services adjusted its leave policies to allow individual state agencies to require substitution of paid leave. *Id.*

B. Effect on Workplace Benefits and Policies

Responses to the RFI indicated a variety of workplace benefits are affected by substitution of paid leave. Employers’ policies pertaining to employer-provided paid leave plans are impacted, as are benefit plans such as workers’ compensation and short term disability, as well as existing collective bargaining agreements. Some government employers also commented on the impact of the inability to substitute compensatory time off for FMLA leave.

1. Effect on Employer Policies

Many employers commented that the regulations force employers to treat employees seeking to use accrued paid leave concurrently with FMLA leave more favorably than those who use their accrued paid leave for other reasons. The Madison Gas and Electric Company, for example, stated that “during ‘peak’ or ‘high demand’ vacation periods, employees may request FMLA leave causing the employer to deny other employees their scheduled leaves due to staffing level concerns based on business needs.” Madison Gas and Electric Company, Doc. 10288A, at 1. The United Parcel Service concurred: “The applicable DOL regulation * * * states that no limitation may be placed by the employer on substitution of paid vacation or personal leave for FMLA leave * * *. Indeed, as written, this regulation would even trump vacation picks conducted according to collectively bargained seniority provisions; an employee with little seniority could, if on FMLA leave during a ‘plum’ vacation week, substitute otherwise unavailable paid vacation time for his or her unpaid FMLA leave.” Doc. 10276A, at 3–4 (citation and quotation marks omitted). Some employers provided specific examples of this phenomenon:

Deer hunting, if you happen to work for someone, usually calls for the individual to request and receive approval to use vacation and or personal leaves of absences during the Deer Hunting season. These requests escalate geometrically during the deer hunting season. Usually approvals for these days off are made using some kind of seniority provisions. Employees who can not get approval can circumvent the “written in cement” policies by securing a Family doctor to provide FMLA documentation for [a serious health condition].

Roger Bong, Doc. 6A, at 3. Another employer stated, “We have had an employee request a week of vacation during the holidays and the request was denied because we had so many other employees off. Then the employee just called off for the entire week using FMLA, and then went on her vacation to Florida.” Vicki Spaulding, Akers Packaging Service, Inc., Doc. 5121, at 1. See also National Coalition to Protect Family Leave, Doc. 10172A, at 5 (“The Department has * * * established preferential rights to employees taking FMLA leave by effectively mandating that employers waive normal vacation and personal leave policies. In fact, nothing in the Act requires preferential treatment for FMLA leave users.”); Temple University, Doc. 10084A, at 5.

As previously noted, section 825.207(e) provides that accrued paid vacation or personal leave may be substituted for any FMLA leave, and an employer may not place any limitations on this substitution right. The preamble to the 1995 Final Rule stated, for example, that an employer could not limit the timing during the year in which paid vacation leave could be substituted, or require an employee to use such leave in full day increments or a week at a time, even if it normally restricted paid vacation in such ways. See 60 FR 2180, 2205, Jan. 6, 1995. Opinion letters relating to the substitution of paid vacation or personal leave have clarified that such leave is “accrued” and thus available for substitution only when the employee has earned it and is fully vested in the right to use it during the leave period. See Wage and Hour Opinion Letters FMLA–81 (June 18, 1996); FMLA–75 (Nov. 14, 1995); and FMLA–61 (May 12, 1995). In contrast to vacation leave, the regulations clarify that substitution of paid sick or medical leave is authorized only “to the extent the circumstances meet the usual requirements for the use of sick/medical leave.” 29 CFR 825.207(c).

The College and University Professional Association of Human Resources suggested employers should be allowed to apply their normal leave policies to all types of paid leave, including vacation and personal leave, in order to ease administrative and paperwork burdens and to eliminate the preferential treatment it believes is afforded to employees seeking FMLA leave over employees requesting vacation or personal leave. Doc. 10238A, at 6. See also Ohio Public Employer Labor Relations Association, Doc. FL93, at 5; Temple University, Doc. 10084A, at 5.

The National Retail Federation suggested clarifying the meaning of “personal leave” under section 825.207. Doc. 10186A, at 8. The Miami Valley Human Resource Association requested clearer guidelines that instruct employers as to when they are allowed to deny employees’ substitution of paid leave, if they fail to follow employers’ leave notification policies. Doc. 10156A, at 4.

The National Coalition to Protect Family Leave commented that many employers are providing general paid time off (“PTO”) benefits to employees—which are provided in a single amount of paid leave to be used for any reason—instead of the more traditional paid leave policies for vacation and medical/sick leave. See Doc. 10172A, at 23. The comment noted

that the regulations still speak in terms of paid personal or vacation leave, thus prohibiting employers from applying “their normal leave rules to the substitution of such leave for unpaid FMLA leave, even when using PTO in connection with an illness.” *Id.* PTO plans generally allow for employees to take paid leave for any reason, as long as company procedures are satisfied.

A law firm commented that “substitution of paid leave should not nullify an employer’s right to require medical certification” where the employer maintains a PTO plan. Fisher & Phillips LLP, Doc. 10262A, at 6. Section 825.207(h) states that if “accrued paid vacation or personal leave is substituted for unpaid FMLA leave for a serious health condition, an employee may be required to comply with any less stringent medical certification requirements of the employer’s sick leave program.” 29 CFR 825.207(h). PTO plans, however, do not distinguish between sick pay and vacation pay and generally have no “sick leave” medical documentation requirement. Thus, according to Fisher & Phillips, an employer should not be prohibited from requiring a medical certification form to determine whether the leave qualifies as FMLA leave “simply because its paid time off program does not require it.” *Id.* The firm further stated:

Essentially, employers with more generous leave programs are often disadvantaged by that generosity, as their employees are more likely to use leave if it is paid. Again, that generosity should not impose an obstacle to employer efforts to determine whether the absence qualifies for FMLA to begin with, or to enforce its paid time off programs consistently.

Id. at 7. The National Coalition to Protect Family Leave agreed that employers with generous PTO plans are restricted by the regulations and suggested such treatment could result in employers reducing paid leave. See Doc. 10172A, at 23.

A comment from a law firm stated that, in terms of tracking FMLA leave, a double standard exists under the regulations. Spencer Fane Britt & Browne LLP, Doc. 10133C, at 50. Many employers allow employees to take non-FMLA leave only in increments that are longer than the time periods used for pay purposes. *Id.* The firm expressed a concern, however, that such a policy may constitute “retaliation” under the FMLA regulations, even though it is allowable for non-FMLA leave. For example, an employer may normally only allow employees to use paid leave in four-hour increments, but if the employee is only away from work for

1.5 hours for an FMLA reason, there is a question as to how much time the employer may charge against the employee’s paid leave balance. *Id.* The comment concludes, “[i]t is inherently unfair to provide employees with FMLA absences with greater benefits than they would otherwise have.” *Id.*

On the other hand, the AFL–CIO commented that Congress placed no limitations on an employee’s right to substitute paid vacation or personal leave, noting that “the Department specifically rejected proposals to limit employees’ substitution rights” when promulgating the FMLA final rules, based on the statutory language. See American Federation of Labor and Congress of Industrial Organizations, Doc. R329A, at 27–28. The AFL–CIO also noted that the prohibition on employer limitations applies only to vacation and personal leave, and that employers remain free to apply their normal rules to the substitution of paid sick leave.

2. Benefit Plans: Short-Term Disability and Workers’ Compensation

As indicated above, the choice to substitute accrued paid leave is inapplicable when employees receive payments from a benefit plan that replaces all or part of employees’ income. See 29 CFR 825.207(d). As the preamble to the 1995 Final Rule explained, if an employee suffers a work-related injury or illness, the employee may receive workers’ compensation benefits or paid leave from the employer, but not both. 60 FR 2180, 2205, Jan. 6, 1995. Thus, when such an injury or illness also qualifies under the FMLA and the employee is receiving workers’ compensation benefits, the employer may not require the employee to substitute paid vacation or sick leave, nor may the employee elect to receive both payments. See *id.* However, the time the employee is absent from work counts against the employee’s FMLA entitlement. See 60 FR at 2205–06. See also Wage and Hour Opinion Letter FMLA2002–3 (July 19, 2002) (allowing FMLA leave to run concurrently with workers’ compensation is expressly allowed under the regulations, but receipt of workers’ compensation payments prohibits the substitution of other accrued paid leave).

One Employee Relations Manager noted a similar rule applicable under some employers’ disability leave policies, pursuant to which “the employees’ use of vacation and other earned time with pay to cover a personal illness may exclude them from qualifying for paid short-term disability

benefits offered by the employer.” Cindy S. Jackson, Employee Relations/Labor Relations Manager, Cingular, Doc. 5480, at 1. A case manager from St. Elizabeth Medical Center, in Edgewood, Kentucky, indicated employees who take FMLA leave for their own serious health condition often qualify for short term disability payments after using a required amount of paid time off. *See* Doc. 10071A, at 3–4. Another employer from Huntington, Indiana said many of its employees on FMLA leave eventually qualify for short term disability, resulting in payments during leave. Bendix Commercial Vehicle Systems LLC, Doc. 10079A, at 3. According to this commenter, “if FMLA were required to be paid by the employer, you would see a lot more use of the intermittent, specifically abuse of FMLA.” *Id.* An HR manager agreed, commenting that an employee who took FMLA leave concurrently with short-term disability leave “allegedly for a painful and permanent spinal condition, is now heading up the company baseball team.” *See* Debra Hughes, HR Manager, Doc. 2627A, at 2; *see also* Roger Bong, Doc. 6A, at 3.

Another commenter felt that the regulations “created a substantial, unintended burden by prohibiting the substitution of accrued, paid leave” during an FMLA leave period that ran concurrently with paid leave taken under a workers’ compensation or a state-mandated disability plan. *See* Employers Association of New Jersey, Doc. 10119A, at 3. This commenter also suggested that employers requiring substitution of paid leave could run afoul of the regulations when employees qualify under a state’s mandatory, non-occupational, temporary disability plan; it also pointed out that many employees actively seek the substitution of their accrued paid leave because temporary disability plans only pay a portion of their salary. *Id.* at 4.

The United Steelworkers also commented on the relationship between short-term or other disability leave and leave under the FMLA, stating that some employers may incorrectly “tell their employees they cannot receive income replacement under the [short term disability] plan and be on FMLA-protected leave at the same time” and thus incorrectly advise employees that they waive their FMLA protections by going on paid disability leave. *See* Doc. 10237A, at 3. To avoid this confusion, the United Steel Workers recommended that the Department “use the rulemaking process to clarify that employers must treat family/medical leave and short-term disability as

separate and independent sources of protection.” *Id.*

Some comments also found difficulties in the way substitution of paid leave provisions are carried out by employers or objected to substitution more generally. The United Transportation Union, Florida State Legislative Board commented that the problem with the substitution of paid leave is that employers can force employees to use their hard-earned vacation and personal leave. *See* Doc. 10022A, at 2. The commenter labeled it an “unfair and burdensome practice.” *Id.*

3. Collective Bargaining Agreements

The substitution of paid leave provisions also interact with existing collective bargaining agreements (“CBAs”). One union commented that employers attempt to circumvent collective bargaining agreements by relying on their statutory right to substitute paid leave, while ignoring their contractual obligations. *See* United Transportation Union, Florida State Legislative Board, Doc. 10022A, at 2. A law firm representing several train and rail unions also noted such a trend: “Notwithstanding the CBAs’ unequivocal mandate that employees are entitled to use their paid leave at the time they choose and not at a time chosen by the carriers, the carriers in 2004 began to, and now routinely, require employees to use their paid leave whenever they exercise their statutory right to FMLA leave—thus usurping the employees’ collectively-bargained right to choose when and for what purpose to use paid leave.” Zwerdling, Paul, Kahn & Wolley, P.C., Doc. 10163A, at 2. The comment concluded that “the statute may not be used as a tool to avoid compliance” with the parties’ prior agreements. *Id.*

Another commenter raised the same issue, noting that this dispute has arisen in the railroad context where several railroad employers have claimed that FMLA gives them the authority to diminish the rights afforded to employees under their existing contracts to decide when and in what manner to use their paid leave. *See* Guerrieri, Edmond, Clayman & Bartos, P.C. (on behalf of several labor unions in the railroad, airline, bus, and other industries), Doc. 10235A, at 2.²² This

²² *See also* Jeanne M. Vonhof & Martin H. Malin, What a Mess! The FMLA, Collective Bargaining and Attendance Control Plans, 21 Ill. Pub. Employee Relations Rep. 1 (Fall 2004) (discussing FMLA and collective bargaining agreements from perspective of labor arbitrators, noting that regulations allow parties to bargain for specific rights, especially option to manage when substitution of paid leave is permitted).

commenter also noted that the Department considered and addressed the issue of collective bargaining agreements in the preamble to the 1995 regulations: “At the same time, in the absence of other limiting factors (such as a State law or applicable collective bargaining agreement), where an employee does not elect substitution of appropriate paid leave, the employee must nevertheless accept the employer’s decision to require it.” *Id.* at 3 (citation omitted).

This law firm also noted that a 1994 Wage and Hour opinion letter further clarifies “that a collective bargaining agreement [can] limit an employer’s ability to require use of paid leave in conjunction with FMLA leave.” *Id.* at 3. *See* Wage and Hour Opinion Letter FMLA–33 (March 29, 1994) (“With reference to your constituent’s concerns pertaining to paid vacation and sick leave, an employer may require an eligible employee to use all accrued paid vacation or sick leave for the family and medical leave purposes indicated above before making unpaid leave available. However, section 402 of FMLA does not preclude the union’s right to collectively bargain greater benefits than those provided under the Act. In this instant case, the subject union could negotiate that substitution of accrued paid leave is an election of the employee only.”).

Further, the commenter referred to the ongoing litigation on this issue and urged that any regulatory action taken by the Department be consistent with this position. Guerrieri, Edmond, Clayman & Bartos, P.C. (on behalf of several labor unions in the railroad, airline, bus, and other industries), Doc. 10235A, at 3–4. *See Bhd of Maintenance of Way Employees v. CSX Transp., Inc.*, 478 F.3d 814 (7th Cir. 2007). In *CSX*, a group of rail carriers required employees to substitute accrued paid leave for family or medical leave covered by the FMLA, relying upon their FMLA right to do so. The carriers required substitution for intermittent leave for the employee’s own condition, but they did not require substitution when an employee used a block of FMLA leave for his or her own serious health condition. The plaintiffs, a collection of rail unions, challenged the action on the grounds that an existing CBA precluded involuntary substitution of paid leave. They claimed that when a CBA gives employees greater rights than the FMLA, the Act does not supersede such contractual rights. The court held that while employers generally are permitted to require substitution of paid leave, the FMLA does not authorize rail carriers that are

subject to the Railway Labor Act (RLA) to do so when that would violate a CBA and the RLA's prohibition against making unilateral changes in working conditions.

The AFL-CIO—in addition to adopting the comments of other unions on this issue—asserted that employers cannot require employees to substitute paid leave for FMLA leave in a manner that contravenes existing CBAs, whether those agreements are subject to the RLA or the National Labor Relations Act. See Doc. R329A, at 29. The AFL-CIO stated that “the Department should make no changes in its regulations governing substitution of paid leave for FMLA leave in the collective-bargaining context.” *Id.*

On the other hand, the Union Pacific Railroad Company noted that its Train and Engine Service employees have an FMLA leave rate that is five times higher than its other employees. See Doc. 10148A, at 2–3. The employer stated that there is no obvious reason for this disparity, such as a higher injury rate. “The only significant differences between the Train and Engine Service employee populations and all others are: 1) The schedules or lack thereof (most T&E employees have no set schedule but rather work on call * * *); and 2) Union Pacific does not require T&E employees to substitute paid leave for FMLA absences of less than 12 hours because paid leave cannot be granted to these employees in smaller increments under their collective bargaining agreements.” *Id.* at 2. Union Pacific explained, for example, that when a T&E employee who is called to duty states that s/he has a migraine and cannot report for two hours, no paid leave is substituted. Employees working under other collective bargaining agreements where Union Pacific can require substitution for less than full day increments are more reluctant to use FMLA leave unless absolutely necessary, because they do not want to decrease their accrued paid leave. See *id.* Three years of employer-collected data show that a “disproportionately high number of FMLA absences among Train and Engine Service employees are in increments of less than 12 hours.” *Id.*

4. Compensatory Time Off

As noted above, subject to the provisions of section 7(o) of the FLSA, state and local government employers may provide employees with compensatory time off at time and one half for each hour worked in lieu of paying cash for overtime. The FMLA regulations at 29 CFR 825.207(i) specifically prohibit employers from

counting compensatory time off against an employee's FMLA entitlement.

One commenter noted the inconsistency in the regulations regarding the use of compensatory time off, stating “[w]hile an employer cannot compel the use of compensatory time, if an employee asks to use it to cover a FMLA absence, the time off should count against the FMLA entitlement. If compensatory time is allowed to be taken in lieu of FMLA leave, the regulations should require employees to take the compensatory time at either the beginning or end of the leave.” City of Portland, Doc. 10161A, at 4. See also Washington Metropolitan Area Transit Authority, Doc. 10147A, at 3 (regulation “discourages employers from working with employees to minimize the negative financial impact of unpaid leave at times when employees are most in need”).

X. Joint Employment

A. Statutory Background

The FMLA covers an employer in the private sector engaged in commerce or in an industry or activity affecting commerce if it employs 50 or more employees for each working day in 20 or more calendar workweeks in the current or preceding calendar year. See 29 U.S.C. 2611(4). An employee of an FMLA-covered employer is “eligible” for the benefits of the FMLA if the employee has worked for the employer for at least 12 months, for at least 1,250 hours of service during the preceding 12-month period, and is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. 29 U.S.C. 2611(2).

Despite the plain wording of these definitions a number of questions have arisen as to their meaning, such as how to treat employees with no fixed worksite, employees who are jointly employed by two or more employers, employees of temporary help companies, and others. The Department included the topics of employer coverage and employee eligibility in its RFI. In particular, the RFI noted that the Court of Appeals in *Harbert v. Healthcare Services Group, Inc.*, 391 F.3d 1140 (10th Cir. 2004), partially invalidated 29 CFR 825.111(a)(3), which states that when an employee is jointly employed by two or more employers, the employee's worksite is the primary employer's office from which the employee has been assigned or to which the employee reports.

B. Department of Labor Regulations

Section 825.104(c) of the regulations addresses who is the employer where more than one entity is involved, such as in an “integrated employer” situation. It provides that the “determination of whether or not separate entities are an integrated employer is not determined by the application of any single criterion, but rather the entire relationship is to be reviewed in its totality.” 29 CFR 825.104(c)(2). Factors considered in determining whether two or more entities are an integrated employer include the degree of common management, interrelation between operations, centralized control of labor relations, and common ownership/financial control.

The Department stated in the preamble to the final rule that the “integrated employer” test is not a new concept, but rather it is based on established case law arising under Title VII of the Civil Rights Act of 1964 and the Labor Management Relations Act.

Section 825.106 of the regulations implements how the Department views employer coverage and employee eligibility in the case of joint employment. It provides that where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under FMLA. For example, where the employee performs work which simultaneously benefits two or more employers, and there is an arrangement between employers to share an employee's services or to interchange employees, a joint employment relationship generally will be considered to exist. *Id.* § 825.106(a). The regulations further provide:

(b) A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality. For example, joint employment will ordinarily be found to exist when a temporary or leasing agency supplies employees to a secondary employer.

(c) In joint employment relationships, only the primary employer is responsible for giving required notices to its employees, providing FMLA leave, and maintenance of health benefits. Factors considered in determining which is the “primary” employer include authority/ responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits. For employees of temporary help or leasing agencies, for example, the placement agency most commonly would be the primary employer.

Id. § 825.106(b)–(c). Under section 825.106(d), employees jointly employed by two employers must be counted by

both employers in determining employer coverage and employee eligibility. Thus, for example, an employer who jointly employs 15 workers from a leasing or temporary help agency and 40 permanent workers is covered by FMLA. Although job restoration is the primary responsibility of the primary employer, the secondary employer is responsible for accepting the employee returning from FMLA leave in place of the replacement employee if the secondary employer continues to utilize an employee from the temporary or leasing agency, and the agency chooses to place the employee with the secondary employer. A secondary employer is also responsible for compliance with the prohibited acts provisions with respect to its temporary/leased employees, and thus may not interfere with an employee's attempt to exercise rights under the Act, or discharge or discriminate against an employee for opposing a practice that is unlawful under FMLA. See 29 CFR 825.106(e).

With regard to the term "worksite," the legislative history states that it is to be construed in the same manner as the term "single site of employment" under the Worker Adjustment and Retraining Notification ("WARN") Act, 29 U.S.C. 2101(a)(3)(B), and the regulations under that Act (20 CFR Part 639). See S. Rep. No. 103-3, at 23 (1993), H.R. Rep. No. 103-8(I), at 35 (1993). Accordingly, the FMLA regulations define the term "worksite" in those cases in which the employee does not have a fixed place of employment by using language that is very similar to the WARN Act definition in 20 CFR 639.3(i)(6). Section 825.111 provides as follows:

(2) For employees with no fixed worksite, e.g., construction workers, transportation workers (e.g., truck drivers, seamen, pilots), salespersons, etc., the "worksite" is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. For example, if a construction company headquartered in New Jersey opened a construction site in Ohio, and set up a mobile trailer on the construction site as the company's on-site office, the construction site in Ohio would be the worksite for any employees hired locally who report to the mobile trailer/company office daily for work assignments, etc. If that construction company also sent personnel such as job superintendents, foremen, engineers, an office manager, etc., from New Jersey to the job site in Ohio, those workers sent from New Jersey continue to have the headquarters in New Jersey as their "worksite."

29 CFR 825.111(a)(2).

When applying the employee eligibility test (i.e., the 50 employees/75 miles test) to employees of temporary

help offices and others who are jointly employed by two or more employers, however, the regulation provides that "the employee's worksite is the primary employer's office from which the employee is assigned or reports." 29 CFR 825.111(a)(3).

C. Wage and Hour Opinion Letter

In Wage and Hour Opinion Letter FMLA-111 (Sept. 11, 2000), the Department considered the application of the FMLA regulations' "integrated employer" test and "joint employment" tests in sections 825.104 and 825.106 to a "Professional Employer Organization" (PEO). The PEO in question had established a contractual relationship with its clients under which it established and maintained an employer relationship with the workers assigned to the clients (who were leased worksite employees provided via the contract with the client) and assumed substantial employer rights, responsibilities and risks. Specifically, the PEO assumed responsibility for personnel management, health benefits, workers' compensation claims, payroll, payroll tax compliance, and unemployment insurance claims. Moreover, the PEO had the right to hire, fire, assign, and direct and control the employees.

Based on the facts described in the incoming letter, the Opinion Letter found that "it appears" the PEO is in a joint employment relationship with its clients for these reasons:

1. The PEO is a separately owned and a distinct entity from the client as it is under contract with the client to lease employees for the purpose of handling "critical human resource responsibilities and employer risks for the client."
2. The PEO is acting directly in the interest of the client in assuming human resource responsibilities.
3. The PEO appears to also share control of the "leased" employee consistent with the client's responsibility for its product or service.

Based on the specified responsibilities, the Opinion Letter stated that "it would appear that" the PEO is the "primary" employer for those employees "leased" under contract with the client. Thus, the PEO would be responsible for giving required notices to its employees, providing FMLA leave, maintaining group health insurance benefits during the leave, and restoring the employee to the same or equivalent job upon return from leave. The "secondary employer" (i.e., the client) would be responsible for accepting the employee returning from FMLA leave in place of a replacement employee if the PEO chooses to place the employee with the client. The

Opinion Letter concluded that the client, as the "secondary" employer, whether a covered employer or not under the FMLA, is prohibited from interfering with a "leased" employee's attempt to exercise rights under the Act, or discharging or discriminating against an employee for opposing a practice that is unlawful under the Act.

D. Harbert v. Healthcare Services Group, Inc.

Section 825.111(a)(3) of the regulations provides that for an employee jointly employed by two or more employers, the "worksite" is the location of the primary employer's office from which the employee is assigned or reports. In *Harbert v. Healthcare Services Group, Inc.*, 391 F.3d 1140, the Court of Appeals held that section 825.111(a)(3), as applied to the situation of an employee with a long-term fixed worksite at a facility of the secondary employer, was arbitrary and capricious because it: (1) Contravened the plain meaning of the term "worksite" as the place where an employee actually works (as opposed to the location of the long-term care placement agency from which Harbert was assigned); (2) contradicted Congressional intent that if any employer, large or small, has no significant pool of employees nearby (within 75 miles) to cover for an absent employee, that employer should not be required to provide FMLA leave to that employee; and (3) created an arbitrary distinction between sole and joint employers.

With respect to the term "worksite," the court stated that Congress did not define the term in the FMLA, and it concluded that the common understanding of the term "worksite" is the site where the employee works. With respect to the employee eligibility requirement of 50 employees within 75 miles, the court noted that Congress recognized that even potentially large employers may have difficulty finding temporary replacements for employees who work at geographically scattered locations. Congress thus determined that if any employer (large or small) has no significant pool of employees in close geographic proximity to cover for an absent employee, that employer should not be required to provide FMLA leave to that employee. Therefore, the court concluded that:

An employer's ability to replace a particular employee during his or her period of leave will depend on where that employee must perform his or her work. In general, therefore, the congressional purpose underlying the 50/75 provision is not effected if the "worksite" of an employee

who has a regular place of work is defined as any site other than that place.

391 F.3d at 1150.

In comparing how the regulations apply the term “worksite” to joint employers and sole employers, the court stated:

The challenged regulation also creates an arbitrary distinction between sole employers and joint employers. For example, if the employer is a company that operates a chain of convenience stores, the “worksite” of an employee hired to work at one of those convenience stores is that particular convenience store. *See* 58 FR 31794, 31798 (1993). If, on the other hand, the employer is a placement company that hires certain specialized employees to work at convenience stores owned by another entity (and therefore is considered a joint employer), the “worksite” of that same employee hired to work at that same convenience store is the office of the placement company.

391 F.3d at 1150.

Importantly, the court did not invalidate the regulation with respect to employees who work out of their homes: “We do not intend this statement to cast doubt on the portion of the agency’s regulation defining the ‘worksite’ of employees whose regular workplace is his or her home. *See* 29 CFR 825.111(a)(2).” 391 F.3d at 1150, n.1. Nor did the court invalidate the regulatory definition in section 825.111(a)(3) with respect to employees of temporary help companies: “An employee of a temporary help agency does not have a permanent, fixed worksite. It is therefore appropriate that the joint employment provision defines the “worksite” of a temporary employee as the temporary help office, rather than the various changing locations at which the temporary employee performs his or her work.” 391 F.3d at 1153.

E. RFI Comments and Recommendations

The RFI requested specific information, in light of the court’s decision in *Harbert*, on the definition in section 825.111 for determining employer coverage under the statutory requirement that FMLA-covered employers must employ 50 employees within 75 miles. The Department also sought comment on any issues that may arise when an employee is jointly employed by two or more employers or when the employee works from home. Below are some of these comments.

1. “Worksite” for Employees Jointly Employed by Two or More Employers

The AFL-CIO in its comments urged the Department not to revise 29 CFR § 825.111 (a)(3) to reflect the court’s decision in *Harbert* that held this

section to be invalid when applied to a jointly-employed employee with a long-term fixed worksite at a facility of the secondary employer. *See* Doc. R329A, at 18, 21. The AFL-CIO pointed to the legislative history that the term “worksite” is to be construed in the same manner as the term “single site of employment” under the WARN Act and the regulations under that Act.

Specifically, the AFL-CIO agreed with the dissent in *Harbert* that the Secretary’s interpretation of “single site of employment” under the WARN Act regulations as applying equally to employees with and without a fixed worksite is a “permissible and reasonable interpretation”:

[Interpreting the WARN Act regulation so that it] only applies to employees without a regularly fixed site of employment would seem to contravene the express language of the provision which mentions other categories, including employees who “travel from point to point, who are outstationed, or whose primary duties involve work outside any of the employer’s regular employment sites.”

Doc. R329A, at 20 (citations omitted).

Finally, the AFL-CIO agreed with the dissent that the application of the rule does not result in arbitrary differences between sole and joint employers under the FMLA. *See id.* at 20. Instead, it results in a rational distinction, rooted in the very purpose of the 50 employees within 75 miles rule, where the placement agency locates and hires the worker for the client agency:

Basing FMLA eligibility on primary employers prevents confusion and provides certainty, because a temporary placement employee’s coverage could vary daily were he placed in different [locations of the client employer] on a rotating basis. Further, contrary to the court’s assertion, the ability of a * * * [client employer] and a placement agency to find abundant nearby replacements probably is not identical, after all, the placement agency specializes in hiring and placing employees within the area.

Doc. R329A, at 20–21 (citation omitted).

The National Partnership for Women & Families similarly commented that it believes the current regulations are sound and do not require change. Specifically, the National Partnership stated that the preamble to the FMLA regulations makes clear that the Department gave much consideration to the question of how best to determine an employee’s worksite. It noted that the Department’s definition of the employee’s “worksite” is in accord with the FMLA’s legislative history, namely, that the term was to be construed the same as the term “single site of employment” under the WARN Act regulations. The National Partnership

commented that the purpose of designating the primary office as the worksite is to ensure that the employer with the primary responsibility for the employee’s assignment is the one held accountable for compliance with these regulations. *See* Doc. 10204A, at 6. The National Partnership stated that the same principles articulated in the regulations with regard to “no fixed worksite” situations also should apply to this factual scenario. “In cases where employees have long-term assignments, we believe the purposes of the FMLA are best served by using the primary employer from which the employee is assigned as the worksite for determining FMLA coverage.” *Id.*

Similarly, the Public Service Company of New Mexico commented that it has employees who perform work in a remote area or at home, and that it always interprets the most favorable option for the employee for FMLA eligibility. “There is no known benefit to our company if we deny FMLA to certain workers simply due to their remote location.” Doc. 10074A, at 3.

On the other hand, the National Council of Chain Restaurants commented that 29 CFR 825.104 and 825.106 are overly vague and expansive in their definitions of joint and integrated employment. Doc. 10157A, at 3. The National Council stated that these regulations were creating a potential liability for many restaurant franchisees and other small business owners who should not be considered employers under the Act. *Id.*

Oftentimes, individuals will have an ownership interest in one or more restaurants or stores. The FMLA regulations create a potential risk that a joint employment situation or a single integrated enterprise will be found even when the franchisee has few, if any, individuals who work at or for more than one of the restaurants or stores.

Id. at 4.

The law firm of Pilchak Cohen & Tice commented that, under the current regulations, employees at the same size establishment are treated differently because one works for a traditional sole employer and the other works for a staffing firm:

For example, where a small retail store chain may have many employees nationwide, each store could employ fewer than 50 employees. Those employees clearly would not be eligible for FMLA in the traditional employment context. Yet, under the current regulation, if that same retail chain utilized contract employees from an entity which employed more than 50 employees from its home office and that is where the contract employees received their assignments from or reported to, those contract employees could have FMLA rights at the retail chain. This creates an arbitrary distinction between

sole and joint employers * * * Under 29 CFR 825.106(e), an employer could contract for an engineer, Employee A, for a six-month project, and then find out after the employee has only been there for two weeks, that Employee A will need 12 weeks off due to the upcoming birth of his child. Upon Employee A's departure, the employer would then have to spend the time and expense training Employee B only to [be] forced to return Employee A to the position, even though it had already spent time training two individuals. The employer would then have to spend additional time and expense bringing Employee A "up to speed" on the project and complete the training initially started.

Doc. 10155A, at 7.

Pilchak Cohen & Tice stated that the regulation would be more palatable if, to qualify for FMLA job restoration with the client company, the contract employee had to have at least 12 months of service at that location. *Id.*

As discussed below, the law firm of Fisher & Phillips commented that an Outsourcing Vender (elsewhere called a Professional Employer Organization, or PEO) should not be treated as a joint employer. In contrast with an employer who uses a PEO, however, Fisher & Phillips stated that a small employer who uses employees from a temporary agency may still have to comply with the FMLA:

In this context, aggregation of the number of employees of both the temporary agency and the worksite employer may make sense in some cases because the temporary agency can help the smaller employer adapt to an employee's leave of absence by reassigning another temporary worker. Moreover, this regulation is consistent with Congress' intent that the application of the FMLA not unduly burden smaller employers who are unable to reassign employees to cover for absent workers.

Doc. FL57, at 6.

The law firm of Smith & Downey commented that placement agencies (as opposed to PEOs, as discussed below) face a different problem than other employers, in that they may not succeed in obtaining the client company's agreement to reinstate an employee who is returning from FMLA leave. Smith & Downey stated that in many cases although the placement agency dutifully fulfills its FMLA obligations, the entity with whom the employee was placed refuses to reinstate the employee returning from FMLA leave. Doc. FL106, at 1. "This scenario typically places the placement agency in an impossible position, particularly in those cases where the only placements provided by the placement agency are with the single entity in question." *Id.* at 2.

Smith & Downey commented that the client company may not be able to keep

a position available for the temporary employee who is on FMLA leave because the position is mission-critical to the company's success, and it proposed that the Department issue regulations that provide for an exception to the usual joint employment rules in those cases in which the employee is placed in a position that is mission-critical to the client employer. *Id.*

The National Coalition to Protect Family Leave commented that the court in *Harbert* was correct in distinguishing between a jointly employed employee who is assigned to a fixed worksite and a jointly employed employee who has no fixed worksite and changes worksites regularly. "As for the former, the worksite for purposes of determining whether they are eligible employees * * * would be the fixed worksite of the secondary employer. As for the latter, the worksite would continue as stated in the regulation[.]" Doc. 10172A, at 13.

Finally, Access Data Consulting Corporation stated that the best way to resolve identifying the employer is for the Department to clarify that "the person's employer is the entity from which their paycheck is written." Doc. 10029A, at 2. This commenter stated that in the case of an employee who is employed by a long-term care placement agency and is assigned to work at the home of a client, the employer of record is the placement agency, not the client, because the paycheck is derived, or written from, the placement agency. "This is not a situation where the employee has two employers; the employee has one—the placement agency, and that company's demographics should be used to determine FMLA eligibility." *Id.*

2. Professional Employer Organizations (PEOs)

A number of commenters, including the AFL-CIO, Jackson Lewis, Wilson Sonsini Goodrich & Rosati, Fulbright & Jaworski, Littler Mendelson, Fisher & Phillips, and TriNet, commented that the regulations incorrectly consider Professional Employer Organizations or PEOs (sometimes called HR Outsourcing Venders) to be joint employers with their client companies.

The comments submitted by the law firm of Jackson Lewis explained the typical differences between a temporary staffing agency and a PEO: A temporary staffing agency is a labor supplier that supplies employees to a client employer. A PEO is a service provider that provides services to existing employees of a company. Doc. R362A, at 3. Jackson Lewis commented that the

determination of whether an employee is a "key" employee for purposes of considering entitlement to leave, for example, is made by the client employer and not by the PEO. It further stated that, unlike a temporary staffing agency, a PEO does not have the ability to place an employee returning from FMLA leave with a different client employer. *Id.* at 4.

Jackson Lewis commented that, like the employees of temporary staffing agencies, the client employer should include the employees serviced by a PEO for purposes of the 50 employee threshold, but should not include the corporate employees of the PEO or the employees of other clients of the PEO. *See* Doc. R362A, at 3, 5. "In the PEO context, the "worksite" is the client's workplace. Just as in *Harbert*, aggregating unrelated companies that utilize the services of the same PEO is contrary to the purpose and intent of the statute and improperly creates coverage of employees that were not intended to be covered by the FMLA." *Id.* at 5.

The AFL-CIO commented that PEOs engage in a practice known as "payrolling," in which the client employers transfer the payroll and related responsibilities for some or all of their employees to the PEO, and that typically, the PEO also makes payments on behalf of the client employer into state workers' compensation and unemployment insurance funds, but the PEO does not provide placement services. In contrast with a temporary staffing agency, this commenter stated, PEOs do not match people to jobs. *See* Doc. R329A, at 16.

Thus, PEOs do not fit the model of the primary employer who should bear the FMLA's job restoration responsibilities in a joint employment situation, because there is no evidence to suggest that hiring and related functions fall to them, as opposed to the client employer. * * * Client employers should not be able to shed FMLA responsibilities when they have contractual relationships with entities such as PEOs that are not able to fulfill the FMLA's job restoration responsibilities, despite how attractive it may be for the client to shift, and the PEO to "accept," those responsibilities. For all of these reasons, we urge the Department to reconsider its joint employment rules as they apply to PEOs and similar organizations.

Id. at 17-18.

The law firm of Wilson Sonsini Goodrich & Rosati commented that 29 CFR 825.106(d) has led to a broader coverage of the Act than was intended by Congress. *See* Doc. R122A, at 4. Many small or start-up companies use PEOs to administer their payroll and benefits or provide other human resources assistance and this may

constitute a “joint employer” relationship. “As a result, an employer that has only 15 employees (which is the cause of the need to outsource human resources functions) and would not otherwise be covered by the FMLA must count the employees of the PEO in addition to their own employees, which results in FMLA coverage for the employer.” *Id.*

The law firm of Littler Mendelson stated that a “PEO arrangement” refers to a circumstance in which a customer contracts with another company to administer payroll and benefits, and perform other similar functions. Doc. 10271A, at 2. “Employee leasing arrangements”—like those involving temporary services firms and other staffing companies—refer to arrangements in which the staffing firm places its own employees at a customer’s place of business to perform services for the recipient’s enterprise. The PEO assumes certain administrative functions such as payroll and benefits coverage and administration (including workers’ compensation insurance and health insurance). The PEO typically has no direct responsibility for “hiring, training, supervision, evaluation, discipline or discharge, among other critical employer functions.” *Id.* Littler Mendelson argued that an employer—employee relationship between the PEO and these employees does not exist, based on the economic realities of the relationship and the fact that the employee is not dependent on the putative employer for his economic livelihood. “Because a PEO does not control its client’s employees, does not hire, fire or supervise them, determine their rates of pay or benefit from the work that the employees perform, the PEO cannot be considered an employer under the FLSA or the FMLA.” *Id.* at 3.

Littler Mendelson commented that PEOs typically provide their services to small businesses and add value by administering their payroll process and providing access and administration of employee benefits that would be cost prohibitive if the small businesses tried to contract for these benefits on their own. “It makes no sense to make an otherwise non-covered employer subject to the FMLA, in contravention of Congress’ intent [in creating a small business threshold], simply because it contracts with a PEO for payroll services and other administrative benefits.” *Id.* at 6.

The law firm of Fisher & Phillips commented on the same kinds of differences discussed above between a PEO and a temporary employment agency, staffing agency or traditional leasing company.

Specifically, if an employer contracts with an HR Outsourcing Vendor, should the number of individuals employed by the HR Outsourcing Vendor (PEO) be aggregated with the number of individuals employed by the employer in question? In addition, should the number of Individuals employed by the HR Outsourcing Vendor’s other clients (within a 75-mile radius) be aggregated with the number of individuals employed by the employer in question. The answer to both of these questions is “no.” Unfortunately, under the current regulations, this answer is not clear. Consequently, the ambiguity from the two controlling regulations on the issue (Sections 825.111 and 835.106(d)) has forced some employers to turn to the Judicial system for relief. Thus, in the interest of Judicial economy, ensuring compliance with the FMLA where warranted, and effectuating Congress’ intent to protect small employers from the burdens of the FMLA, we respectfully request the DOL to revise and clarify not only Section 825.111, but also Section 826.106(b)–(e) concerning joint employment, as these sections relate to * * * [PEOs]. In addition, or alternatively, we urge the DOL to implement new regulations that expressly detail the requirements for an entity to be subject to the requirements of the FMLA. * * * Extending Section 835.106(d) to encompass relationships between * * * [PEOs] and their clients produces absurd results that were not intended by Congress and do not adhere to the intent of the FMLA. Doc. FL57, at 2–3.

TriNet commented that in the case of a PEO, the employee is hired first by the client company and the PEO enters the picture when the client company signs up with the PEO and the existing workforce begins to receive PEO services. “The timing is exactly opposite with a temporary staffing agency that first has an employee in its pool of talent and then second assigns that employee to a particular company to work.” Doc. FL109, at 3.

The law firm of Fulbright & Jaworski commented that PEO responsibilities vary by organization and contract, but that most are not involved in the day-to-day operations of their client’s business and do not exercise the right to hire, fire, supervise or manage daily activities of employees. In some cases, the PEO and the client are not in the same city. Doc. FL62, at 1. The firm commented on the need for the Department to clarify that opinion letter FMLA—111 (Sept. 11, 2000) is about an atypical PEO who actually exercised control over client’s employees. “This comment letter requests a Department regulation [as follows] clarifying that the most common type of PEOs—PEOs that do not exercise control of employees” are not covered employers under the FMLA.” *Id.* at 2.

Professional Employer Organizations that contract to perform administrative functions, including payroll, benefits, regulatory

paperwork, and updating employment policies, are not joint or integrated employers with their clients under the provisions of 29 CFR 825.104 and 825.106, provided they do not exercise control over the day-to-day activities of the client’s employees or engage in the hiring or firing of the client’s employees.

Id. at 6.

3. Employees Who Work at Home

The RFI also sought comment on what constitutes the worksite for an employee who works from home. As discussed above, the Access Data Consulting Corporation commented that the employer should be determined “by the entity from which their paycheck is written.” Doc. 10029A, at 2. This commenter stated that the same principle should apply to workers who work from home. *Id.*

The National Coalition to Protect Family Leave commented that 29 CFR 825.111(a)(2) already addresses the issue of identifying the worksite for employees who work at home by expressly stating that an employee’s home is not an appropriate worksite. In such cases, the location the employee reports to or that furnishes the employee with assignments is the worksite for FMLA purposes. “The Coalition concurs with this analysis * * * [and] asks DOL to clarify the situation where an employee is jointly employed and works out of his home instead of changing locations regularly or at a secondary employer’s premises. In such circumstances, the Coalition recommends that the employee’s worksite be the primary employer’s office from which the employee is assigned or reports.” Doc. 10172A, at 13.

XI. Data: FMLA Coverage, Usage, and Economic Impact

To assist in analyzing the impacts of the FMLA, the Department presented estimates of the coverage and usage of FMLA leave in 2005 in the “FMLA Coverage and Usage Estimates” section of the Request for Information (“RFI”).²³ The Department requested comment on these estimates and any data that would allow the Department to better estimate the costs and benefits of the FMLA, as well as particular issues for which the Department was seeking additional information.

The Department’s estimates were based, in large part, on a report it published in January 2001, *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys*,

²³ 2005 data was used because the 2006 annual employment figures were not available in December of 2006 when the RFI was published.

2000 Update and its underlying employer and employee surveys. As the Department explained in the RFI, this report is commonly referred to as “the 2000 Westat Report”—available online at www.dol.gov/esa/whd/fmla2007report.htm.²⁴

The 2000 Westat Report was a compilation, analysis, and comparison of one set of survey research with another set that was conducted in 1995. Title III of the Family and Medical Leave Act established a bipartisan Commission on Family and Medical Leave to study family and medical leave policies. The Commission surveyed workers and employers in 1995 and issued a report published by the Department in 1996, “A Workable Balance: Report to Congress on Family and Medical Leave Policies” — available online at www.dol.gov/esa/whd/fmla2007report.htm.

The RFI was not meant to be a substitute for survey research about the leave needs of the work force and/or leave policies being offered by employers. Nonetheless, the Department identified a number of issues in the RFI on which it sought quantitative data that would supplement and update the data that was collected by the Westat surveys. The Department specifically asked for information and data on:

- The approach the Department used to estimate the number of eligible FMLA workers at covered establishments in 2005;
- The approach the Department used to estimate the number of FMLA leave-takers given the data limitations and methodological issues in the 2000 Westat Report, and other available data that could be used to refine its estimate;
- The approach the Department used to estimate the number of covered and eligible workers taking intermittent FMLA leave, and other available data that could be used to refine its estimate;
- The approach the Department used to estimate the number of covered and

eligible workers taking unforeseen intermittent FMLA leave, other available data that could be used to refine this estimate, and information on the prevalence, durations, and causes of intermittent leave; and,

- The economic impact of intermittent FMLA leave and unforeseen intermittent leave, including any differences between large and small employers, the impact that unscheduled intermittent leave has on productivity and profits, information on the concentration of workers taking unscheduled intermittent FMLA leave in specific industries and employers, and information on the factors contributing to large portions of the work force in some facilities taking unscheduled, intermittent FMLA leave.

The Department also asked for information related to the different treatment of FLSA exempt and nonexempt employees taking unscheduled, intermittent FMLA leave, and the different impact the leave taken by FLSA exempt and nonexempt employees may have on the workers who are taking leave and their employers. More generally, the Department also asked for information that can be used to improve the estimates of the impact that FMLA leave has on employers and employees, and for any data that would allow the Department to better estimate the costs and benefits of the FMLA.

In response to this request, the Department received a significant amount of quantitative and qualitative data from a wide variety of sources that updates and builds upon the data collected in the Westat surveys. This includes a wide variety of national survey data from employers and employees; detailed information from specific employers, both large and small, in a wide variety of industries; and economic studies, or references to economic studies, on the costs and benefits of the FMLA.²⁵

The Department also received comments on the estimates it presented in the RFI, many of which were consistent with the Department’s estimates. Many comments stated that the Department’s estimates of FMLA usage, especially of intermittent FMLA leave, appear to be low given their experience. In this chapter, the Department presents both the estimates developed for the RFI and the comments received about those estimates. Although the Department evaluates the RFI estimates based upon the comments received, no revisions to the RFI estimates have been developed at this time. Finally, this chapter offers some observations about the impacts of certain aspects of FMLA leave on certain sectors of the economy.

Care should be taken to avoid drawing improper comparisons of data submitted in response to the RFI with the data from the Westat surveys. The record presented here is different than the previous two Departmental reports because the RFI is a different information-gathering tool than the previous surveys. Given the differences in the data gathering approaches, the depth with which the RFI looked at specific regulatory issues, and, of course, the differences in the self-selection of those who took the time to submit comments to the RFI compared to voluntarily responding to previous survey questionnaires, variations in the data should be expected.

A. Comments on the 2000 Westat Report and Further Data Collection

The Department used the 2000 Westat Report as the basis for the coverage and usage estimates presented in the RFI. Although the Department did not specifically ask for comments on estimates in the 2000 Westat Report, it did note that it was “interested in refining the coverage and eligibility estimates in the 2000 Westat Report,” and highlighted a number of important results and caveats from the 2000 Westat Report.

Electric, Verizon, Delphi, MGM Mirage, Union Pacific, and Palmetto Health) or government and quasi-government agencies (e.g., New York City, Dallas Area Rapid Transit, Fairfax County, VA, the Port Authority of Allegheny County, PA, and the City of Portland, OR). Other comments provided references to previously published studies (e.g., Darby Associates, the Center for WorkLife Law, Women Employment Rights, and the Family Care Alliance). Many comments were also received from labor organizations and family advocates (e.g., AFL–CIO, Communications Workers of America, National Partnership for Women and Families, Families USA, 9to5, National Association of Working Women). Finally, the Department received many comments from workers who took FMLA leave.

²⁴ Westat is a statistical survey research organization serving agencies of the U.S. Government, as well as businesses, foundations, and state and local governments. These surveys were commissioned by the Department of Labor in 2000 as an update to similar 1995 surveys ordered by the Commission on Family and Medical Leave, which was established by Title III of the FMLA. Many of the comments to the RFI cited the Westat Report and surveys but referred to it by a number of names including the West Report, Westat’s FMLA Report, the FMLA Report, the Department’s FMLA Report, and the 2000 FMLA Report. In order to minimize any confusion in this chapter, the report will be referred to as the “2000 Westat Report,” the employer survey will be referred to as “Westat’s employer survey,” the employee survey will be referred to as “Westat’s employee survey,” and when discussing both the employer and employee surveys they will be referred to as the “Westat surveys.”

²⁵ Some of the data submitted were national surveys (e.g., AARP, International Foundation of Employee Benefit Plans, Society for Human Resource Management, National Association of Manufacturers, U.S. Chamber of Commerce, WorldAtWork, and the College and University Professional Association for Human Resources). Others submitted surveys or collections of reports from their clients, customers, or members (e.g., Willock Savage, Kalamazoo Human Resources Management Association, Manufacturers Alliance, Air Conference, Association of American Rail Roads, Retail Industry Leaders Association, National Federation of Independent Business, HR Policy Association, International Public Management Association for Human Resources, and American Bakers Association). Numerous other comments provided data from individual companies (e.g., United Parcel Service, U.S. Postal Service, Honda, Southwest Airlines, YellowBook, Madison Gas and Electric Company, Edison

The Department received a few comments alleging the RFI was critical of the 2000 Westat Report. For example, the National Partnership for Women & Families stated that “[t]he RFI takes great pains to criticize the 2000 study of FMLA[.]” Doc. 10204A, at 2. However, as the Department explained in the RFI, there were several methodological issues that Westat itself noted (particularly in Appendix C)²⁶ that may have resulted in, among other issues, the overestimation of FMLA-covered and eligible workers and an underestimation of workers not covered.²⁷ Identifying some of Westat’s own caveats and limitations was not a criticism of the 2000 Westat Report. Rather, the methodological issues of the 2000 Westat Report referred to in the RFI, some of which had to do with statistics regarding intermittent leave, were meant to fully inform the public about the limitations of the 2000 Westat Report particularly in light of how the data was being used and because the Department was interested in refining some of the estimates. It should further be noted that the Department based its best estimates on the 2000 Westat Report and believes that, despite the caveats noted, the 2000 Westat Report still provides a great deal of useful information and data on FMLA leave-takers. A number of commenters concurred, stating: “the 2000 Westat Study, even with its limitations, has been invaluable and represents the best available source for information on FMLA usage and coverage.” Faculty & Staff Federation of Community College of Philadelphia, Local 2026 of the American Federation of Teachers, Doc. 10242A, at 2.

Other commenters, however, were more critical of the 2000 Westat Report. For example, the U.S. Chamber of Commerce noted that the questionnaire used to survey establishments “provides little insight * * * on the nuanced complexity of the law, the vagueness that has resulted in abuse of FMLA leave, the cost associated with compliance and, more significantly, the cost associated with providing leave to employees who likely were not intended to be covered by the statute.” Doc. 10142A, at 11. Another comment noted “[t]he Department does not have an accurate measure of intermittent leave because this was not covered adequately by the Westat surveys” and that “there are a few questions in [the employer] survey that address intermittent leave, but not necessarily the FMLA definition of intermittent

leave.” Randy Albelda, Heather Boushey, and Vicky Lovell, Doc. 10223A, at 2. An economic analysis of the FMLA by Criterion Economics concluded that the results of the Westat surveys “are subjective, qualitative, incomplete, and biased in the direction of understating the costs of FMLA[.]” National Coalition to Protect Family Leave, Doc. 10172A, Attachment at 23.

A number of groups favored additional data collection, beyond the RFI, but were split as to whether such additional data collection was needed to form the basis for rulemaking or would even contribute significantly beyond what is already known and available. The National Partnership for Women & Families noted that “the lack of available data on many of the issues raised in the RFI is an unfortunate reminder of DOL’s failure to conduct objective studies on the FMLA and its implementation in recent years. * * * DOL has neglected to undertake significant efforts to update this research, thus leaving an information void. While the RFI solicits data from commenters on a long list of questions, in many cases it is DOL that has been—and is—best positioned to gather the relevant data to provide answers.” Doc. 10204A, at 2. “DOL has a particularly important role in conducting and commissioning objective, scientifically sound research that can be used to inform and assess implementation of the FMLA,” and that pursuing changes to the FMLA regulations without such data is unwarranted and inappropriate. *Id.* The AFL-CIO stated “The Department should not yield to anecdotal evidence with respect to the purported burden of leave on employers as a basis for tightening the eligibility rules for FMLA leave. Anecdotes can never substitute for hard data[.]” Doc. R329A at 9.

Randy Albelda, Heather Boushey, and Vicky Lovell mirrored the comments of others that recommended that “[a]dditional data collection, using nationally representative surveys, could illuminate the issues raised in the RFI” while noting that the Westat surveys “provide us with valuable information about family and medical leave-taking[.]” Doc. 10223A, at 1, 2. Criterion Economics concluded that “[t]he Department has taken the first step towards a more complete and accurate assessment by soliciting additional information through the RFI[.]” National Coalition to Protect Family Leave, Doc. 10172A, Attachment at 23. The U.S. Chamber of Commerce also recommended that a “follow-up study with employers should be conducted,” but did not believe such further study should delay regulatory action “strongly

recommend[ing]” that the Department initiate a rulemaking. Doc. 10142A, at 12. Another economic analysis by Darby Associates noted that although “the data are scattered, spotty, frequently inconsistent, and largely anecdotal and episodic,” “[t]here is in the record a substantial amount of data, analysis and conjecture on which to base a description of various attributes of benefits and costs arising from over a decade of experience under the FMLA.” National Coalition to Protect Family Leave, Doc. 10172A, Attachment at 7.

The Department does not dispute that the RFI was not a nationally representative FMLA survey as were the Westat surveys and the Department makes no attempt to directly compare data from such different types of information collection. The Department, nevertheless, believes that the RFI was a useful information collection method that yielded a wide variety of objective survey data and research, as well as a considerable amount of company-specific data and information that supplements and updates our knowledge of the impacts of FMLA leave. In fact, several organizations conducted national surveys in response to the RFI.²⁸

Finally, the Department asked a number of questions in the RFI on intermittent leave because one of the findings of the 2000 Westat Report was that “most employers report no adverse effects [from FMLA], including from intermittent leave,”²⁹ while more recent information on intermittent leave from private sector surveys and reports, recommendations to the Office of Management and Budget, and stakeholder meetings suggested that intermittent leave is a difficult issue for many employers, particularly in some industries. Moreover, there was not a lot of information on the issue in the 2000 Westat Report. As the remainder of this chapter demonstrates, the data and information obtained in response to the RFI provides considerable insight and a far more detailed picture of the workings of the FMLA, and the impact of intermittent leave, than the Westat surveys.

B. Number of Covered and Eligible Workers

The Department presented its best coverage estimates in the RFI. These estimates were based upon updating the estimates in the 2000 Westat Report to account for differences in employment between 2000 and 2005 and

²⁸ See also footnote 25.

²⁹ See 2000 Westat Report, Foreword by DOL at ix.

²⁶ See 2000 Westat Report, at C–1.

²⁷ See 2000 Westat Report, at 3–4.

“correcting” some of the methodological issues in the 2000 Westat Report. A full description of the Department’s approach was presented in the RFI and resulted in the following estimates:

NUMBER OF COVERED AND ELIGIBLE EMPLOYEES UNDER THE FAMILY AND MEDICAL LEAVE ACT IN 2005

	In millions
Total U.S. Employment	141.7
Employees at FMLA-Cov- ered Worksites	94.4
Eligible Employees at FMLA- Covered Worksites	76.1

Note: Employment for 2006 was not available at the time the RFI was published in December 2006.

The Department did not receive any substantive comments on its coverage or eligibility estimates or the methodology it used to produce those estimates and concludes that these estimates are currently the best available.

C. Number of Workers With Medical Certifications for Chronic Conditions

Although the Department did not specifically ask in the RFI for comments on the number of covered and eligible workers who have medical certifications for FMLA leave, nor did it ask for this information in either the 1995 FMLA surveys or Westat surveys, it received a wide variety of information and data on this issue. Nationwide survey data and company-specific reports indicate that a significant number of workers have medical certifications on file with their employers for chronic health conditions, especially for some facilities or workgroups, and that the number is increasing. For example:

- Respondents to the National Association of Manufacturers’ survey reported “that 25 percent of those eligible for FMLA leave had medical certifications on file for a ‘chronic’ illness that permitted unannounced, unscheduled intermittent leave.” Doc. 10229A, at 10.

- Another comment noted that “[s]everal other [air] carriers report that 50% or more of all flight attendants and agents are certified for FMLA leave.” Air Conference, Doc. 10160A, at 4.

- A survey by the U.S. Chamber of Commerce found “[l]arge companies reported having generally 15 percent of the workforce with active medical certifications for FMLA at any time.” Doc. 10142A, at 2.

- Verizon noted that 44 percent of the employees in its Florida Network Centers division had medical certifications and their Business Solutions Group saw a jump in medical

certifications from 28 percent in 2005 to 42 percent in 2006. Doc. 10181A, at 4.

- The Commonwealth of Pennsylvania stated that it has two 24/7 healthcare facilities where 6 percent and 10 percent of the workers have medical certifications that excuse them from working mandatory overtime. Doc. 10042A, at 3.

- The City of New York noted that 32 percent of all police communication technicians (911 call-takers) have medical certifications. Doc. 10103A, at 3.

The data received in response to the RFI suggest that a significant number of workers in certain facilities and workplaces have medical certifications on file for chronic health conditions, which due to certain regulatory provisions and interpretations can allow these workers to take unscheduled intermittent leave with little or no notice, or to be excused from certain shifts or mandatory overtime.

D. Number of FMLA Leave-Takers

The Department presented three estimates of the number of covered and eligible workers who took FMLA leave in 2005 and asked for information and data on the approach it used to make these estimates, and for other available data that could be used to develop its estimates given the data limitations and methodological issues in the 2000 Westat Report. A full discussion of the Department’s approach was presented in the RFI and resulted in the following estimates:

	Percent of covered & eligible workers taking leave	Number of FMLA leave-takers (in millions)
Upper-bound Estimate*	17.1	13.0
Employer Survey Based Estimate**	8.0	6.1
Lower-bound Estimate*	3.2	2.4

*From the Westat employee survey.

**The Department used a rate of 6.5 percent of covered workers in the RFI. The rate presented here is the percentage of covered and eligible workers calculated by dividing 6.1 million by 76.1 million.

In response to this request the Department received a significant amount of data on FMLA leave usage from a wide variety of sources, including nationally representative survey data and detailed information from specific employers, both large and small, in a wide variety of industries. The Department also received a few comments on the data limitations with

its approach and methodology for estimating FMLA leave usage.

1. Comments on the Department’s Approach and Data on the Number of Leave-Takers

The Department received very few comments on its approach. Most of the comments concerning the Department’s leave estimates presented FMLA usage figures at or above the Department’s estimates, although many of these were for individual employers or certain facilities of individual employers. For example:

- The U.S. Postal Service reported that 18.4 percent of its 620,688 employees took FMLA leave in 2006.³⁰ Doc. 10184A, at 3.

- Madison Gas and Electric Company stated, “[o]ur data shows 30% of eligible workers requested FMLA leave. Of the 30%, only 69% of the requested leaves qualified as FMLA leave. This resulted in 20% of eligible workers taking a qualified FMLA leave.” Doc. 10288A, at 4.

- Delphi reported that at one of its large manufacturing facilities in the Midwest “nearly one of every five” workers took FMLA leave in 2005. Doc. 10225A, at 1.

- UnumProvident reported that 17 percent of the employees in the FMLA program that it administers for 95 clients nationwide took FMLA in 2006. Doc. 10008A, at 1–2.

- First Premier Bank stated that “[o]n average, over 25% of our staff has been on FMLA at one point or another during the course of a year. There is almost 10% of our staff on FMLA at any given time.” Doc. 10101A, at 1.

- The University of Washington noted that “[i]n our organization of 950 employees * * * we consistently have 20% of the workforce absent from work under FMLA[.]” Doc. FL17, at 2.

The Department notes that although some employers experienced higher rates of FMLA usage than the rates published in the RFI, this does not indicate that these estimates were wrong. The Department presented three alternative estimates of average FMLA use across all employers in all industries of the economy in the RFI. Clearly some employers in some industries will experience higher rates of usage just as other employers in other industries may experience lower rates. For example, the International Foundation of Employee Benefit Plans conducted a nationwide survey of 241 corporate benefit managers, public

³⁰The U.S. Postal Service only reported data for those employees who are in its eRMS system.

employers, and professional service providers and found:

Percent of workers using FMLA leave	Percent of companies
Less than 1%	9
1% to 3%	17
4% to 6%	22
7% to 10%	17
11% to 15%	11
16% to 20%	6
More than 20%	4
Don't Know	13

Doc. 10017A, at 17.

Although it is not possible to calculate the mean of this survey, the median of those reporting a percentage is between 7 percent and 10 percent. This would appear to be consistent with the national average findings presented in the 2000 Westat Report that 6.5 percent of workers employed at facilities covered by the FMLA took FMLA leave, and reflects the comments that suggest “[w]ith the exception of Westat’s employer survey, in which double counting may have occurred, the data tends to show that FMLA usage remains low.” AFL–CIO, Doc. R329A, at 5 (footnote omitted).

Additional comments reported FMLA usage that is consistent with the range the Department estimated in the RFI. For example:

- A nationwide survey of 1,356 covered and eligible workers age 50+ by AARP found that 9 percent took leave under the FMLA. Doc. 10228B, at 5.

- The NJ Transit reported that 9 percent of its employees are covered and eligible leave-takers. Doc. FL85, at 8.

- FNG Human Resources stated that “an average of 8% of employees [are] on some manner of Family Medical Leave at all times.” Doc. FL13, at 2.

- Progressive Inc. also reported that approximately 10 percent of its workforce is on FMLA leave at any given time. Doc. FL2, at 1–2.

- The AFL–CIO stated that “our survey shows that almost 16 percent (15.99%) of respondents have taken FMLA leave. These results are well within the general range of the Westat employee-based survey[.]” Doc. R329A, at 7.

Further, comments clearly show that FMLA leave usage varies with workgroups of some employers and that using averages for FMLA usage may hide the impact it has on some employers and some facilities/workgroups within employers. For example:

- Union Pacific reported that “17% of Train and Engine Service employees use FMLA leave versus 3.5% use among all

other employees (5 x more). This disproportionate rate of use is magnified when coupled with the fact that Train and Engine Services employees make up roughly 46% of all employees company wide (25,000 of 54,000 total).” Doc. 10148A, at page 2.

- The Manufacturers Alliance reported that one “member company that is highly diversified, with eight business groups, states that the percentage of FMLA leave taken intermittently within those groups has ranged from a low of 10 percent to a high of 75 percent. Across all units, the company estimates that the percentage of intermittent leave as a percentage of all FMLA leave is in the range of 40 to 50 percent.” Doc. 10063A, at 3.

2. Trend in the Number of Workers Taking FMLA Leave

A number of comments indirectly echoed Randy Albelda, Heather Boushey, and Vicky Lovell, who specifically noted that “using the 2000 share of those taking leave with 2005 employment data may also underestimate the true take-up of the FMLA.” Doc. 10223A, at 1. The Albelda letter speculated that more people may know their FMLA rights in 2005 compared to 2000, just as the 1995 FMLA surveys and Westat surveys showed an increase in the percentage of covered workers taking FMLA leave from 1995 to 2000. Madison Gas and Electric attributed its higher rate to employers’ “increased awareness and recordkeeping related to FMLA leave” and “[e]mployees have also become more aware of their rights under FMLA, which has changed the scope of leaves requested and taken.” Doc. 10288A, at 4.

A number of other commenters explicitly reported that the use of FMLA leave has increased since 2000. For example:

- The Air Conference stated that “[t]he percentage of employees using FMLA is steadily increasing” in the airline industry. Doc. 10160A, at 4.

- The Port Authority of Pittsburgh stated that “the number of employees on an approved leave at any one time has increased by five percent. In 2002 approximately 6% of the workforce was on leave at any one time. Over the years, this number has steadily increased to the current level of 11%.” Doc. FL135, at 2.

- “The Dallas Area Rapid Transit (DART) has experienced a significant increase in FMLA utilization over the past four years. Employee FMLA absences increased from 1,965 workdays in FY 2003, to over 6,100 workdays in 2006.” Doc. FL41, at 2.

- The National Association of Manufacturers commented that “for one major auto parts manufacturer, applications for FMLA leave increased 150-fold in ten years,” Doc. 10229A, at 4.

- The City of New York reported that “[t]he use of FMLA leave * * * has increased substantially in the last five years, from 10.8% of all medical leave in 2001 * * * to the 2006 level of 27.0% of all medical leave.” Doc. 10103A, at 2.

- Aztec Manufacturing reported that “FMLA absences have grown 200% from 2002 to 2006.” Doc. 10081A, at 2.

Others suggested that FMLA usage remains low. The Department notes, however, that firms with higher than average FMLA usages rates probably have a greater incentive to report their higher rates than those with rates lower than the average.

Although the weight of the comments strongly suggests that the percentage of employees using FMLA leave has increased, particularly in some industries, the range of workers who took FMLA leave in 2005 (between 3.2 percent and 17.1 percent) is consistent with the data submitted in response to the RFI. Nevertheless, the Department recognizes it is possible that the number of workers who took FMLA leave in 2005 is more likely to be between 6.1 million and 13.0 million than between 2.4 million and 6.1 million. As the next section indicates, awareness of the FMLA appears to be higher in 2005 than in 1999 when Westat conducted its surveys. So just as FMLA usage increased between the times the two surveys sponsored by the Department were conducted in the 1990s, given the comments received it is likely that FMLA usage increased between 1999 and 2005.

3. Awareness of FMLA Leave Usage

In the RFI, the Department also raised the issue about the difference between its lower-bound estimate based upon Westat’s employee survey and its best estimate based upon Westat’s employer survey. The Department noted: “2.4 million may be a lower-bound estimate in that it may under-estimate the number of covered and eligible workers who actually took FMLA leave, because evidence exists that many workers are unaware that their leave qualified and that their employers may have designated their leave as FMLA leave.” 71 FR 69511.

The Department received many comments on this issue. For example, one commenter stated that “[t]he obvious reason for this [discrepancy between employer and employee survey

figures] is that a significant number of employers are not properly informing employees that they are utilizing FMLA leave time when that is actually occurring." Kennedy Reeve & Knoll, Doc. 4763A, at 13.

Others believe that there may be some confusion over FMLA leave when other types of leave are taken concurrently. The National Council of Chain Restaurants, for example, stated that the Department asked "why employee estimates regarding the use of FMLA are so much lower than employer estimates. We believe employees are much more likely to focus on whether leave is paid or unpaid, and only to count unpaid leave as FMLA leave when they answer such questions." Doc. 10157A, at 7. The Commonwealth of Pennsylvania reported that 6 percent of its employees "use some type of FMLA qualifying leave without pay each year." Doc. 10042A, at 2. However, this did "not include employees who use paid leave in lieu of unpaid FMLA leave." *Id.*

Data from the Westat surveys and other surveys suggest that when many employees think of FMLA leave, they only think of unpaid leave and do not realize that FMLA leave often runs concurrently with paid leave. They do not associate taking paid sick leave and other forms of paid leave (e.g., vacation, personal) as taking FMLA leave "when at times it may be designated as such by their employer as permitted by the statute. For example, AARP's national sample of workers 50 or more years old reported that "[d]espite high overall awareness of FMLA and the fact that the majority (58%) of survey respondents have taken at least some time off for family- or medical-related reasons within the past five years, only nine percent of respondents (or 15% of leavetakers) reported that any of the time taken was FMLA leave." Doc. 10228B, at 4.

4. Continuing Concern With Estimates of Leave Usage Over Time

After reviewing the comments the Department continues to believe that the available data do not enable an accurate estimation of the total number of workers who took FMLA leave since 1993, and remains concerned about the possible misinterpretation of its estimates and misapplication of its methodology for estimating the number of workers who took FMLA leave in a given year. In fact, the Department received a few comments with different estimates of the number of workers who have taken FMLA leave since 1993. For example, the National Women's Law Center noted, without citation, that "[c]lose to 80 million workers have

taken FMLA leave in the last 14 years[.]" and 9to5 stated, again without citation, that "FMLA has allowed more than 50 million Americans to take job-protected leave[.]" Doc. 10272A, at 1; and Doc. 10210A, at 1, respectively.

As noted in the RFI, the Department has determined that the available data do not enable the accurate estimation of the total number of workers who have taken FMLA leave from 1993 to 2005 because "establishments may double count persons that took more than one FMLA leave" during the 18–20 month survey period that began in January 1999. Moreover, this double counting is even more likely to occur over the longer period that began in 1993 due to workers who have chronic conditions, more than one family member with a serious health condition, or multiple pregnancies or adoptions.

5. Differences Between FLSA Exempt and Nonexempt Workers

In the RFI the Department solicited the following information with respect to workers who are salaried and exempt from the Fair Labor Standards Act ("FLSA") under 29 CFR Part 541:

- The Department requests that commenters submit information related to the different treatment of FLSA exempt and nonexempt employees taking unscheduled, intermittent FMLA leave.

- The Department also requests information on the different impact the leave taking by FLSA exempt and nonexempt employees may have on the workers who have taken leave and their employers.

The Department received a few comments in response to this request but they were generally vague and inconclusive. Some comments indicated that nonexempt employees tend to take more FMLA leave than exempt employees. For example, "[t]he majority of our FMLA requests are from hourly Fair Labor Standards Act-nonexempt employees." University of Wisconsin-Milwaukee, Doc. FL120, at 1. Others indicated that FMLA usage by nonexempt workers presents more of an issue than FMLA usage by exempt workers because nonexempt workers tend to take more unscheduled intermittent leave. For example:

As a general rule, non-exempt employees are more likely to use unscheduled intermittent leave than exempt employees. In the case of exempt employees, many tend to work more than 40 hours each week anyhow, or make up the time later, or work from home even when on a leave of absence. Exempt employees tend to use FMLA leave primarily for birth of a child, acute illnesses or surgery, or planned medical treatment (e.g.,

chemotherapy), all of which normally result in scheduled time off and predictable time off. In most cases, these leaves are continuous leaves or intermittent leaves over a period of less than six (6) months.

Spencer Fane Britt & Browne LLP, Doc. 10133C, at 22.

However, several comments, particularly from the Society for Human Resource Management chapters, suggest that the difference between exempt and nonexempt employees is not their pattern of FMLA leave use but rather the way their employers track the use of FMLA leave. One commenter stated that "many employers do not keep track of partial day absences of exempt employees because it is virtually impossible to know if and when the time has been made up. Many exempt employees make up the time of their own volition." Arkansas Society for Human Resource Management State Council, Doc. 5161, at 1. Another commenter noted that "[t]racking FMLA leave in such small increments is extremely burdensome—particularly with respect to exempt employees, whose time is not normally tracked." Northern Arizona University, Doc. 10014A, at 5. One worker also agreed that employers treat exempt and nonexempt workers differently when it comes to tracking FMLA leave:

I know there is inconsistency throughout the company on the application of how FMLA is measured. For example, exempt employees are allowed to take time off and it is generally considered that if you have [worked] a minimum of 5 hours, you have [worked] a full day. If I call in late due to being ill, the time I work is measured and if I do not make the 8 hours, I'm expected to log the difference. If another exempt calls in late because their child is sick, nothing is done. If they come in late or leave early, it is never a problem. My time is always scrutinized and questioned.

An Employee Comment, Doc. 10336A, at 9.

Although there was no consensus in the comments on whether one group is taking more FMLA leave than the other group, one commenter noted an apparent difference in the manner in which exempt and nonexempt employees are paid while on FMLA leave. For example, Madison Gas and Electric stated "[a] variance also exists between time taken by FLSA exempt and non-exempt employees. Exempt employees are typically paid for time away while non-exempt employees do not receive pay, unless they are able to substitute from a paid leave balance. This pay for leave time differences generally increases the amount of time taken by FLSA exempt employees." Doc. 10288A, at 5.

E. Number of Workers Taking Intermittent FMLA Leave

The Department presented its estimate of the number of covered and eligible workers who took intermittent FMLA leave in 2005 and asked for information and data on the approach it used to make the estimate, and for other available data that could be used to refine its estimate. As noted in the RFI, the Department used data from Westat's employee survey to develop an estimate of the number of workers that used intermittent FMLA leave in 2005. Specifically, Westat's employee survey found that almost one-quarter (23.9 percent) of covered and eligible workers who took FMLA leave reported taking their leave intermittently. That is, they repeatedly took leave for a few hours or days at a time because of ongoing family or medical reasons. Therefore, based on the Westat survey data, about 1.5 million FMLA leave-takers (i.e., 23.9 percent of 6.1 million FMLA leave-takers) or about 2 percent of the workers employed in the establishments covered by the FMLA (i.e., 1.5 million of 94.4 million) used intermittent leave in 2005.

In response to this request, the Department received a significant amount of data on intermittent FMLA leave usage from a wide variety of sources, including nationally representative survey data and detailed information from specific employers, both large and small, in a wide variety of industries. In fact, the Department received more data on this issue (and the unscheduled component of intermittent leave discussed in the following section) than almost any other issue in the coverage and usage section of the RFI. The Department also received a few comments on the data limitations with its approach and methodology for estimating intermittent FMLA leave usage.

1. Comments on the Department's Approach To Estimating Intermittent FMLA Leave Use

As was noted in the RFI, the Westat surveys "tended to focus on the longest leaves taken for family and medical reasons rather than the leaves taken intermittently." However, the Westat surveys also asked some questions related to intermittent leave.

Randy Albelda, Heather Boushey, and Vicky Lovell submitted one of the most critical comments on the Department's approach that touched on some data limitations of Westat's employee survey while noting that "data that are available from the survey seem to suggest a wide range of possible leave-takers who might use the leave

intermittently." Doc. 10223A, at 2. Specifically, the Albelda letter stated:

[The Department's] approach may substantially understate the use of intermittent leave. The Department uses data from the employee survey, which does not ask about the number of intermittent leaves, asking instead whether those who took a leave for purposes covered under FMLA leave took their leave intermittently. Some, none, or all of that leave may have been under FMLA, but there is no way to know from the survey questions. Further, the Department applies this "guesstimate" to the total number of leave-takers, which may not be correct. As the Department points out, this assumes that all groups of workers are equally likely to take intermittent leave, which may not be true.

The Department does not have an accurate measure of intermittent leave because this was not covered adequately by the Westat surveys". The Westat employee survey asks how many leaves employees took over the previous 16–18 month period and probes further about two of their longest leaves, but does not specifically ask about FMLA-defined intermittent leave[.]

Doc. 10223A, at 2.

This criticism notwithstanding, the Albelda letter went on to identify a number of questions in the Westat employee survey that might be used to refine the Department's approach and reached nearly the same estimate as that presented by the Department in the RFI, that intermittent FMLA leave appears to be important for more than a quarter of leave-takers. Specifically, the Albelda letter noted:

The data that are available from the survey seem to suggest a wide range of possible leave-takers who might use the leave intermittently. For example, 27.7 percent said they alternated between leave and work (question A5BB), with more than half (53.3 percent) of that group indicating they did that for less than half of their leave (question A5C). So, a relatively large number indicate not taking a leave all at once, but over half did so for less than half of their leave. In another part of the survey, 7.2 percent of leave-takers said that they were not off work the entire time during their longest leave over the past 16–18 months (question A3E). Of those who took multiple leaves, 20 percent indicated they alternated between leave and work (question A8); of those, 13 percent indicated they do so regularly (question A8A). Thus, the ability to use FMLA leave intermittently appears to be an important feature of the policy for more than a quarter of leave-takers.

Doc. 10223A, at 2–3 (footnote omitted).

Madison Gas and Electric Company stated that "the approach used by the Department [to estimate the usage of intermittent leave] seems sound but will vary between employers. The estimated use of intermittent leave is lower than the experience of our company." Doc. 10288A, at 4.

A number of commenters who were critical of the Department's approach recommended that the Department collect additional information about intermittent FMLA leave, which was one of the objectives of the RFI. See Chapter XI, section A.

2. Data on the Number of Intermittent Leave-Takers

The Department received a significant amount of data on the number and percentage of workers who have taken intermittent FMLA leave that supplements and updates the results of the 2000 Westat Report. For example, a nation-wide survey of 241 corporate benefit managers, public employers, and professional service providers by the International Foundation of Employee Benefit Plans found:

Percent of FMLA leave that is taken intermittently	Percent of companies
Less than 5	48
5 to 15	16
16 to 25	10
26 to 55	6
More than 55	5
Don't Know	14

Doc. 10017A, at 20.

Although it is not possible to calculate the mean of this survey, the median of those reporting a percentage is between 5 percent and 15 percent, which is below Westat's estimate that 23.9 percent of FMLA leave-takers took some of their leave intermittently. Other comments also reported percentages of intermittent FMLA leave lower than either Westat's estimate or the Department's estimate that about 2 percent of all workers employed in the establishments covered by the FMLA took intermittent FMLA leave. For example:

- According to the WorldatWork survey, 18.1 percent of FMLA leaves in 2005 were due to chronic conditions. Doc. 10201A, at 11.

- The AFL–CIO stated "in our survey just 12 percent of all respondents reported having taken intermittent leave. This finding supports that available evidence, which shows that 'intermittent leave is used infrequently[.]'" Doc. R329A, at 7.

- One member company of the Manufacturers Alliance stated that intermittent leave "is rare and generally involves ongoing medical treatment[.]" This company "does not see a lot of intermittent leave—probably less than 10 percent of all leave taken." Doc. 10063A, at 2.

Many comments, however, reported intermittent FMLA usage above either

the Westat or the Department's estimates. For example:

- The University of Washington reported "5% of employees are currently approved for intermittent FMLA leave." Doc. FL17, at 2.

- Honda reported that 2,249 employees out of an employee population of 20,757 (about 11 percent) took a total of 22,250 days of intermittent FMLA leave in 2006. Doc. 10255A, at 6.

- NJ Transit reported that "fully 95 percent of [FMLA] requests were for intermittent leave." Doc. FL85, at 5.

- Progressive Inc. reported that 75 percent of its employees' FMLA leaves are intermittent. Doc. FL2, at 2.

- The Madison Gas and Electric Company reported that "[o]ver one-third of employees within our company request intermittent leave which is higher than the estimate determined by the Department." Doc. 10288A, at 4.

See also Delphi Inc, Doc. 10225A, at 2; Kalamazoo Human Resource Management Association, Doc. 10035A, at 2; HR Policy Association, Doc. R367A, at 3; Southwest Airlines Co., Doc. 10183A, at 3.

Other comments show that intermittent FMLA leave usage varies by workgroup within some employers, and that using averages for intermittent FMLA usage across industries and operations within industries may hide the impact that FMLA usage has on some employers and some facilities/workgroups within employers. For example:

- Based on client comments, Spencer Fane Britt & Browne stated "[t]here are employers who report that they have as many as 40–50% or more of all their employees, and as much as 75–100% of employees within a particular work group or department, who have submitted medical certifications for and use intermittent leave for chronic conditions." Doc. 10133C, at 19.

- Southwest Airlines reported that "[i]n the workgroup with the highest percentage of FMLA use in relation to [the] number of employees, Reservations, intermittent FMLA represents 75% of the FMLA leaves over the last two years[.]" Doc. 10183A, at 3.

- The Manufacturers Alliance reported that one highly diversified member with eight business groups stated "that the percentage of FMLA leave taken intermittently within those groups has ranged from a low of 10 percent to a high of 75 percent" with a company wide average of "40 percent to 50 percent." Doc. 10063A, at 3.

See also MGM Mirage, Doc. 10130A, at 4; Briggs and Stratton, Doc. FL37, at

1–2; and Association of American Railroads, Doc. 10193A, at 1.

A number of other comments reported that intermittent leave usage is increasing. In some cases the reported increases are very large. For example:

- DST Systems, Inc. stated that "[t]he burden of intermittent leave is steadily growing. The number of intermittent leaves at our company has grown almost 300% in one year, from 71 in 2005 to 221 in 2006." Doc. 10222A, at 2.

- Verizon provided the example of its Customer Financial Services Mass Market group where "the use of intermittent leave has increased from 22% of eligible employees in 2004 to 30% in 2005 and 37% in 2006." Doc. 10181A, at 4.

- National Association of Manufacturers reported that "[f]or one major auto parts manufacturer * * * the use of intermittent leave increased five times more quickly than that for regular FMLA leave. Our data indicate that the experience of this company is typical of manufacturers." Doc. 10229A, at 4.

The fact that some employers have higher rates of intermittent FMLA leave use than the averages estimated by the Department is not surprising, especially in view of the self-selection of those who took the time to submit comments to the RFI. Moreover, it is noteworthy that the preponderance of companies responding to the survey conducted by the International Foundation of Employee Benefit Plans reported that less than 25 percent of FMLA leaves were taken intermittently.

On the whole, the data presented above appear to be consistent with the ratios used by the Department to develop the estimates presented in the RFI, i.e., that about one quarter of FMLA leaves are taken intermittently. However, the Department believes that its estimate that about 1.5 million workers took intermittent FMLA leave in 2005 may be too low because the estimate of 1.5 million workers taking intermittent FMLA leave was based upon the estimate of 6.1 million workers taking FMLA leave and for the reasons discussed above (e.g., increased employee awareness), the 6.1 million estimate may be low. Moreover, the comments also suggest that more workers appear to be taking intermittent FMLA for chronic serious health conditions.

F. Number of Workers Taking Unforeseen or Unscheduled Intermittent FMLA Leave

The Department presented its estimate of the number of covered and eligible workers who took unscheduled intermittent FMLA leave in 2005 and

asked for information and data on the approach it used to make the estimate, and for other available data that could be used to refine its estimate.³¹ The Department also requested comment on the prevalence, durations, and causes of intermittent leave.

As noted in the RFI, the Department used the responses to Question A8a in Westat's employee survey as a rough "proxy" for the percentage of the employees who took unscheduled intermittent FMLA by assuming that the portion of the intermittent FMLA leave-takers who took unscheduled leave were the 45.4 percent that answered "As Needed" to Question A8a. Thus the Department estimated that about 700,000 workers (i.e., 45.4 percent of 1.5 million) took unscheduled intermittent FMLA leave in 2005.

In response to this request, the Department received a significant amount of data on the use of unscheduled intermittent FMLA leave from a wide variety of sources, including nationally representative survey data and detailed information from specific employers, both large and small, in a wide variety of industries. The Department also received a few comments on the data limitations with its approach and methodology for estimating intermittent FMLA leave usage.

Although the Department did not receive significant comments on its method for estimating the number of workers who took unscheduled intermittent FMLA leave in 2005 (about 12 percent of workers taking FMLA leave), the Department acknowledges that the uncertainty regarding this estimate is larger than that of the estimate of intermittent FMLA leave because data on taking leave as needed was used as a proxy for unscheduled intermittent leave. Moreover, it is important to note that many of the estimated 700,000 workers may take a number of unscheduled intermittent leaves depending on their chronic health condition.³²

The Department did receive a significant amount of data on the number and percentage of workers who

³¹ Commenters used the terms "unscheduled" and "unforeseen" interchangeably.

³² For example, Randy Albelda, Heather Boushey, and Vicky Lovell noted that data from the Westat employee survey found that for the 27.7 percent who said they alternated between leave and work (question A5BB), more than half (53.3 percent) of that group indicated they did that for less than half of their leave (question A5C). Doc. 10223A, at 2–3. This implies that nearly one-half (46.7 percent) used more than half of their leave intermittently. Given the comments that were received, certainly a significant amount of this intermittent leave was unscheduled. *Id.*

have taken unscheduled intermittent FMLA leave. Many commenters also used terms such as “certified for intermittent leave” or “leave taken intermittently for chronic conditions” to describe their data. For example:

- The National Association of Manufacturers said that “respondents to the NAM’s survey” reported that 25 percent of those eligible for FMLA leave had medical certifications on file for a “chronic” illness that permitted unannounced, unscheduled intermittent leave. If only those workers used intermittent leave, manufacturers are experiencing a use of intermittent leave at nearly 8 times the national average!” Doc. 10229A, at 10.

- Southwest Airlines noted that “[m]ost of the intermittent leave at Southwest is also taken on an unscheduled basis, without advance notice by employees, particularly during the last five years.” Doc. 10183A, at 1.

- New York City said that “[t]he use of FMLA leave, particularly unscheduled intermittent leave, by PCTs [police communication technicians] has increased substantially in the last five years, from 10.8% of all medical leave in 2001, to a high of 39.6% of all medical leave in 2003, to the 2006 level of 27.0% of all medical leave.” Doc. 10103A, at 2.

Other comments show that unscheduled intermittent FMLA leave usage varies with workgroups of some employers; these comments suggest that using averages for FMLA usage may hide the impact it has on some employers and some facilities/workgroups within employers. For example:

- The National Association of Manufacturers said that “[f]or one major manufacturer, a staggering 60 percent of all FMLA leave taken in the last nine months was for a period of one day or less. Nearly all of this leave was unscheduled, nearly all of it unannounced.” Doc. 10229A, at 10.

- The University of Wisconsin-Milwaukee stated “[i]n one department alone, of 135 hourly blue-collar employees, 37 took FMLA during 2006, or roughly 27.4 percent. Of the 37 who used FMLA during 2006, 24 were on intermittent, unscheduled FMLA, or roughly 65 percent of those who used FMLA were on intermittent unscheduled FMLA.” Doc. 10098B, at 3.

- The U.S. Chamber of Commerce provided several examples of workplaces where the large numbers of active FMLA certifications permit a significant portion of the workforce to take unscheduled FMLA leave. “Large companies reported having generally 15 percent of the workforce with active

medical certifications for FMLA at any time. Some employers reported extraordinary levels of active FMLA cases. * * * One employer reported certain facilities with 30 percent of the workforce classified as FMLA active. Another employer reported a call center where 50 percent of the workforce was classified as FMLA active.” Doc. 10142A, at 2, n. 2.

After reviewing the comments, it appears that the Department’s unscheduled intermittent FMLA leave estimates presented in the RFI—that about 700,000 workers took unscheduled intermittent FMLA leave—may be too low for at least a couple of reasons. First, as noted in the previous section, the Department’s estimate of the number of workers who took intermittent leave in 2005 appears to be low. Second, the comments also suggest that a significant percentage of FMLA covered and eligible workers have medical certifications on file for chronic conditions that enable them to take unscheduled intermittent leave with little or no notice.³³ Thus, it is likely that a significant portion of the estimated 6.1 million workers who took FMLA leave in 2005 (perhaps several million) took some form of intermittent leave and that many of the workers who took intermittent leave took at least some of it without prior notification.

Finally, it is clear from the record and the comments received that if another nationwide survey of both employers and employees on the use and impact of FMLA is conducted in the future, it should do more than simply update the Westat surveys. The Westat surveys were not designed to inquire specifically about many of the issues currently being raised (e.g., the use of unscheduled intermittent FMLA leave); the definition of “intermittent leave” used by Westat did not match the statutory definition; and the Westat surveys did not collect data on medical certifications for chronic health conditions.

G. The Economic Impact of FMLA Leave

Previous congressional testimony, the 2000 Westat Report, other surveys, and stakeholder meetings suggest that the FMLA has significant benefits and costs. Further, most surveys of workers and employers show that, while the FMLA has been generally effective in carrying out the congressional intent of the Act, some aspects of the statute and regulations have created challenges for both workers and employers. As was stated in the RFI:

[T]he Department has not received complaints about the use of family leave—i.e., leave for the birth or adoption of a child. Nor do employers for the most part report problems with the use of scheduled intermittent leave as contemplated by the statute, such as when an employee requests leave for medical appointments or medical treatment like chemotherapy. Rather, employers report job disruptions and adverse effects on the workforce when employees take frequent, unscheduled, intermittent leave from work with little or no advance notice to the employer.

The Department received additional support for this understanding in response to the RFI from both worker and employer groups. For example, the AFL-CIO noted that “[c]oupled with smaller, more recent studies, the 2000 Westat Report shows that the FMLA, as implemented by the regulations, has worked as Congress intended.” Doc. R329A, at 1. Further, the National Association of Manufacturers stated that “the FMLA has achieved its principle goal: leave to care for oneself or one’s family during health problems. * * * Yet there are a number of areas that continue to plague employers who are trying to provide the leave made available by law in a manner that is reasonable and cost-effective.” Doc. 10229, at 3.

Given this assessment, the Department presented Westat’s estimates of the impact that the FMLA had on productivity and profitability (see 71 FR 69513, Table 4), and asked a variety of questions intended to update and supplement data in the 2000 Westat Report on the economic impact of the FMLA. Specifically, the Department asked for:

- Data that would allow the Department to better estimate the costs and benefits of the FMLA.

- How does the availability of FMLA leave affect employee morale and productivity?

- Is there any evidence that FMLA leave increases employee retention, thereby, reducing employee turnover and the associated costs?

- Alternative information related to the different economic impacts that intermittent leave has on large employers compared to smaller employers.

- Alternative information regarding any economic impact that recurring unforeseen, unscheduled, intermittent FMLA leave may have on covered employers, and on productivity and profits.

- Information on the concentration of workers taking unscheduled, intermittent FMLA leave in specific industries and employers.

³³ See Chapter IV.

- Information on the factors contributing to large portions of the work force in some facilities taking unscheduled, intermittent FMLA leave.

- Does scheduled FMLA leave present different problems or benefits from unscheduled FMLA leave? Does intermittent leave present different problems or benefits from leave taken for one continuous block of time? Does the length of leave taken present different problems or benefits?

- How do employers cover the work of employees taking FMLA leave? Does the length of leave impact this coverage? Does the fact that the leave is scheduled or unscheduled impact this coverage? Does the amount of notice given by the leave-taking employee impact this coverage? Does the fact that the leave is intermittent impact this coverage?

- Is there any evidence of employers closing or relocating facilities as a result of employee leave patterns (either scheduled or unscheduled)?

The Department received many comments on some of these questions (e.g., the impact of the FMLA on employees' morale, productivity and profits) and very few, if any, comments on others (e.g., the closing of plants due to the FMLA). Since the responses to many of the questions overlap, the Department decided to organize the findings presented below by topic rather than according to each question asked.

1. Comments on the Department's Approach on the Economic Impacts of the FMLA

It was not the Department's intention in the RFI to focus on just the impact that the FMLA regulations have on productivity and profitability. Rather, the intention was to supplement existing data and information on the wide variety of economic impacts that the FMLA is likely to have on both workers and employers, including productivity and profitability. Despite this, the Department received some criticism that it did not discuss nor solicit sufficient information to assess the overall financial impact of the FMLA on the economy. For example, some Members of Congress noted that there may be "unintended consequences that not only have an adverse effect on employers, they are equally harmful to employees[.]" Letter from 2 Republican Members of Congress, Doc. FL112, at 1. A more specific critique was submitted by Criterion Economics, which stated:

[N]either the Westat survey nor the RFI itself provide an appropriate economic framework for assessing the costs of the FMLA. Both the Survey and the RFI focus on the effects of FMLA on the "profitability" and "productivity" of firms. * * * [T]he costs of

FMLA are likely borne to a significant extent by workers, in the form of reduced wages, higher unemployment, or both; and by consumers, in the form of higher prices.

National Coalition to Protect Family Leave, Doc. 10172A, Attachment at 2.

Darby Associates took another approach and used a standard economic welfare framework to assess the size, nature, and distribution of the Act's benefits and costs and among individuals, and concluded their analysis with a deadweight economic loss estimate. They also noted that many FMLA benefits and costs are difficult to measure. See National Coalition to Protect Family Leave, Doc. 10172A, Attachment.

Finally, the Office of Advocacy at the Small Business Administration (SBA) also noted that in 1995 the Department published a final rule that "improperly compared the number of covered small entities to the total number of small businesses, rather than calculating the number of small businesses that are covered by a rule that will suffer a significant economic impact."³⁴ Doc. 10332A, at 4. The SBA Office of Advocacy recommended a Section 610 review that includes an evaluation of the "degree to which the technology, economic conditions, or other factors have changed * * * the area affected by the rule." Doc. 10332A, at 3.

2. Overall Impacts of the FMLA

Although the intent of the RFI was not to provide a basis for estimating the entire impact of the FMLA on the economy, the Department did receive some comments about the overall impacts of the FMLA. These comments were generally divided into the costs and benefits resulting from the current implementation of the statute. The Department did not receive a single submission that attempted a comprehensive and detailed cost-benefit analysis.

3. Overall Benefits of the FMLA

The Department received many comments discussing the benefits to workers and employers of the FMLA in general as well as specific benefits that result from decreased costs to employers and the economy. These benefits

³⁴ It should also be noted that the Regulatory Impact Analysis that accompanied the Department's 1995 final FMLA rule was based on 1987 and 1993 General Accountability Office (GAO) reports that did not include the net cost associated with replacing workers or maintaining output while workers are on unpaid leave. Nor did it include the costs associated with intermittent or unforeseen intermittent leave for the GAO reports focused on "extended" leave for birth or adoption of a child, a seriously ill child, a seriously ill parent, a seriously ill spouse, and temporary medical leave.

include: The retention of valuable human capital, having more productive employees at work, lower long-run health care costs, lower turnover costs, lower presenteeism costs,³⁵ and lower public assistance costs.

Often these benefits are immeasurable and priceless. See also Chapter I. One worker perhaps said it best: "Last year, my husband was diagnosed with Hodgkin's Lymphoma. * * * It was during this time that my husband needed me most. Had I not had the opportunity afforded to me by the FMLA, I don't know what we would have done. I needed to be there to help him eat, take care of him when he was sick, consult with doctors and nurses, but most of all for mental and emotional support. He still says how important it was that I was with him at all times during this terrible experience. * * * FMLA allowed me to help my husband and not have to worry about job security." An Employee Comment, Doc. 4755, at 1. Clearly, "there is no denying the importance of fundamental benefits conferred by the Act on individuals." National Coalition to Protect Family Leave, Doc. 10172A, Darby Associates, Attachment at 2.

Although none of the commenters developed an overall estimate of the benefits of the FMLA, the comments generally characterized the major benefits to employers as reducing the cost of presenteeism and employee turnover. Additionally, there was a significant amount of anecdotal evidence presented on the benefits to the employees taking FMLA leave and their families.

For example, one commenter noted that "[t]he Department should remember that there would be many hidden costs associated [with] weakening this law. Sick employees will report to work thereby infecting co-workers and further damaging productivity. People will not be able to provide adequate care for sick children and elderly parents. Nobody knows what such neglect might cost our economy." An Employee Comment, Doc. 5438, at 1.

4. Reduced Presenteeism Costs

According to the Center for Worklife Law, "The cost of lost productivity due to presenteeism is significantly greater than the cost of lost productivity due to absenteeism. The total annual cost of lost productivity is \$250 billion. Presenteeism accounts for \$180 billion or 72% of that total. The availability of

³⁵ Presenteeism is where employees report to work when they are ill and perform below the employer's expectations because they are not well.

intermittent FMLA leave incentivizes employees to stay home when they are seriously ill and reduces lost productivity expenses incurred by employers.”³⁶ Doc. 10121A, at 5. “Sick men and women do not add in a positive way to their working environment. What does happen is the population of the surrounding offices are exposed to increased risk of illnesses causing flu, colds and other seasonal illnesses to move more quickly and with a greater toll on our population in general.” An Employee Comment, Doc. 4710, at 1.

The estimates submitted for the record, such as the one cited above, already include a reduction in presenteeism due to the use of the FMLA as the studies were conducted well after the FMLA was enacted in 1993. Although many commenters cited the overall costs of presenteeism and asserted that FMLA has some positive impact on limiting those costs, no one attempted to quantify the marginal effect or economic impact that enactment of the FMLA had on the issue. However, the lack of a quantitative estimate does not mean that the FMLA does not have an impact on presenteeism. Clearly, the FMLA has allowed workers to take leave and not work when they are suffering from a serious health condition that is contagious. On the other hand, it is also evident that workers with contagious illnesses still come to work for a variety of reasons.

5. Increased Employee Retention and Lower Turnover Costs

The Department received many comments emphasizing the positive impact the FMLA has on employee morale and how it increases worker retention and lowers turnover costs. By reducing employee turnover, some commenters argued that the FMLA reduces employer costs.

For example, the Human Rights Campaign noted that “[t]he 2000 Westat Study found that 89% of employers reported that the FMLA has had either a positive or neutral effect on employee morale. The survey also reported that, of those who have taken on added duties when a co-worker has taken FMLA leave, over four in five (85%) say the impact on them was neutral or positive.” Doc. 10179A, at 2. The Center

for Law and Social Policy cited “[t]he 1995 Commission on Leave report [that] found that 10.9 percent of leave-takers who are not covered by FMLA fail to return to the same employer after taking leave, compared to only 1.9 percent of workers who are covered.” Doc. 10053A, at 2. Finally, Local 2026 of the American Federation of Teachers concluded, “[t]he law promotes workforce stability by helping employees retain their jobs when an emergency strikes. We believe the FMLA is essential to greater employee retention and to reducing employee turnover, and it is crucial to preserve FMLA’s protections in their entirety.” Doc. 10242A, at 8.

A survey of AARP members suggests that the FMLA also increases the supply of labor. When FMLA leave-takers in its survey “were asked to speculate about the steps that they would have taken if they had not received FMLA leave, approximately one in ten (11%) indicated that they would have had to quit their job or would have lost their job[.]” Doc. 10228B, at 4.

Notably, the Center for WorkLife Law tried to quantify some parameters of the impact the FMLA has on worker retention. “Employers also profit from the availability of intermittent leave. * * * [T]he total estimated annual replacement cost to employers associated with caregiver attrition is \$6,585,310,888. Without FMLA leave, attrition among employed caregivers would increase even more sharply.”³⁷ Doc. 10121A, at 5.

However, other commenters noted that while some uses of FMLA leave (e.g., for a medical emergency, the birth of a child, to receive medial treatment or therapy) are good for employee morale, the repeated use of unscheduled FMLA leave by some employees can actually have the opposite effect. See Chapter IV, for a more complete discussion.

6. Other Benefits

A number of workers also submitted comments that either explicitly or implicitly identified other important benefits of the FMLA, such as having more productive employees at work, lower long-run health care costs, retaining valuable human capital, and lower public assistance costs. For example,

• “Because of the Act our team is still complete and productive * * * the Family and Medical Leave Act not only

keeps productive teams together in the long run, but it fosters loyalty to the corporation not only for those who take part in family leave, but for those who respect the support of their colleagues. It is a small investment by the corporation for a long term benefit.” An Employee Comment, Doc. 4858, at 1–2.

• “Having a parent available to care for a sick child has proven benefits in shortened recovery times and better health and school outcomes.” 9 to 5, National Association of Working Women, Doc. 10210A, at 1.

• “Because of being able to take time off for treatment and retain my job, my company was able to retain valuable expertise.” An Employee Comment, Doc. 234, at 1.

• “If it were not for FMLA, my family and I would be living in a box under a bridge somewhere * * * if it were not for my employer being understanding and supporting FMLA, [I would] be another statistic of the unemployed in the United States.” An Employee Comment, Doc. 5006, at 1.

Clearly the FMLA has resulted in significant benefits for employers, their employees and the public. Employers benefit from reduced turnover and decreased presenteeism. Workers benefit from being able to take leave to care for themselves and family members with serious health conditions without fear of losing their jobs. Society benefits from the increased supply of trained workers and the reduced need for public assistance. The fact that these benefits have not been quantified or expressed in monetary terms by any of the commenters should not be taken as an indication that these benefits are not substantial.

7. Overall FMLA Compliance Costs

Some commenters cited a 1995 Department of Labor cost estimate³⁸ and a 2004 study by the Employment Policy Foundation that estimated the cost of the FMLA. For example, the SBA Office of Advocacy stated: “In 1995, DOL estimated that the cost to all business from the FMLA [was] \$675 million annually, but only computed the costs of maintaining group health insurance during periods of permitted absences. In contrast, a study by the Employment Policy Foundation (EPF) estimates that the direct costs [of] FMLA leave to employers was \$21 billion in 2004 in terms of lost productivity from absenteeism, continued health benefits, and net labor replacement costs.”³⁹ Doc. 10332A, at 3–4. The EPF estimates were based upon the direct compliance

³⁶ The Center for WorkLife Law’s reference for these estimates was Jodi Levin-Epstein, Presenteeism and Paid Sick Days, Center for Law and Social Policy (February 28, 2005), citing W. Stewart, D. Matousek, & C. Verdon, The American Productivity Audit and the Campaign for Work and Health, The Center for Work and Health, Advance PCS (2003).

³⁷ The Center for WorkLife Law reference for this estimate was “The MetLife Caregiving Cost Study: Productivity Losses to U.S. Business,” MetLife Mature Market Institute and National Alliance for Caregiving, at 12 (July 2006).

³⁸ 60 FR 2180.

³⁹ See also footnote 34.

costs of the firms responding to a membership survey.

The Department received one economic study from Darby Associates that assessed the impact of the FMLA on the economy “based on a review of data and analysis available after a decade of experience under the Act.” National Coalition to Protect Family Leave, Doc. 10172A, Attachment at 1. “The paper concludes that much of the cost of implementation of the Act is effectively a “dead weight” economic loss that reflects economic waste and confers very limited benefit on all but a few stakeholders. These deadweight losses are estimated to be in excess of \$30 billion annually[.]” *Id.* Darby Associates developed their estimate by adding \$11 billion in indirect costs from a 2001 National Association of Manufacturers survey to the \$21 billion direct costs estimate by EPF.

Darby Associates also identified a number of FMLA-related costs that they did not attempt to separately estimate: these include the loss of productivity, increased administrative and personnel costs, overtime pay, decreases in quality and safety, and costs imposed on customers and other employees. National Coalition to Protect Family Leave, Doc. 10172A, Attachment at 15. Darby Associates went on to note that “[m]any of the costs of leave, especially intermittent leave, are experienced in ways that defy measurement “lost opportunities by employers as well as impacts on other employees in the workplace, including stress, inconvenience, loss of morale and workplace effectiveness.” *Id.*, Doc. 10172A, Attachment at 13–14.

A primary finding of Criterion Economics’ analysis is that “the costs of FMLA are likely borne to a significant extent by workers, in the form of reduced wages, higher unemployment, or both; and by consumers, in the form of higher prices.” National Coalition to Protect Family Leave, Doc. 10172A, Attachment at 2. *See also id.*, Doc. 10172A, Darby Associates, Attachment.

8. Summary of the Overall Benefits and Costs of the FMLA

The available evidence appears to support the conclusion that both the costs and benefits of the FMLA are large and difficult to quantify.

The overall weight of the comments is that the FMLA has had immeasurable benefits for millions of workers and has imposed significant costs on the economy. The records show it has likely increased the supply of labor and reduced employer costs by enabling employees to remain in the work force in the face of serious health conditions,

but its costs are borne by individuals as consumers, workers, and economic stakeholders.

As explained in earlier chapters, numerous comments that the Department received in response to the RFI confirm that the greatest challenge for employers associated with the FMLA, and its most significant economic impacts, stem primarily from the unscheduled intermittent leave portion of the FMLA.⁴⁰

Finally, the Department believes that it would be difficult, with any precision, to differentiate the impact that the FMLA has had on the supply of labor, wages and prices from other changes that have occurred over the last 14 years. Similarly, it is not possible, with any precision, to estimate what the labor turnover rates or the cost of presenteeism would be without the FMLA.

H. Comments on the 2000 Westat Report’s Findings on the Impact Intermittent FMLA Leave Has on Productivity and Profitability

The Department received many comments quoting sections of the 2000 Westat Report that suggest intermittent FMLA leave generally is not a problem for employers. For example, Local 2026 of the American Federation of Teachers stated, “[t]he 2000 Westat Study found that 81% of covered establishments reported that intermittent leave had no impact on business productivity, and 94% reported that intermittent leave had no impact on business profitability.” Doc. 10242A, at 6. Similarly, the Women’s City Club of New York stated, “[r]esearch shows that the FMLA has been beneficial to business. A United States Department of Labor employer [survey], released in 2000, found that 9 in 10 covered employers report that the FMLA has a positive or neutral effect on productivity and growth.” Doc. 10003A, at 2.

Similarly, a 2007 Society for Human Resource Management survey found that 71 percent of respondents reported no noticeable effect on productivity. *See* Doc. 10154A, Attachment at 4. However, in the Department’s view, the fact that many employers responding to a survey did not experience problems does not mean that the FMLA does not have a significant impact on the productivity and profits of a number of other employers in certain industries and sectors of the economy. As was noted by Criterion Economics, “[c]ritical aggregate statistics in the Westat Survey are constructed by averaging across all industries. Reliance on simple averages

disguises the fact that certain sectors incur disproportionately high costs as a result of FMLA compliance, and hence leads to estimates that are biased downward.” National Coalition to Protect Family Leave, Doc. 10172A, Attachment at 19.

In other words, just as certain employers reported higher FMLA leave use in response to the RFI than the average estimated by the Department, some employers are likely to incur higher costs than the “average” firm responding to Westat’s employer survey. If these high costs are clustered in specific industries or types of work, then the FMLA could impose significant costs for those clusters of employers while the average number of employers may have reported relatively lower costs.⁴¹

Other comments cited the 2004 study by the Employment Policy Foundation (EPF)⁴² referenced in the RFI as evidence that there are significant costs incurred by some firms in some industries. For example, The Equal Employment Advisory Council stated:

While the 2000 Westat Report * * * suggests little, if any, burden associated with administering FMLA leave, we believe the Report does not accurately reflect the level of difficulty some employers have experienced in attempting to comply with the current FMLA regulations. Many EEAC members participated in a separate survey of 431 large corporations conducted by the Employment Policy Foundation in 2002. Of the 94 companies that responded, the vast majority reported that intermittent leave has been a problem to administer (87.2%). * * * Most of the respondents who were able to quantify the cost of complying with the regulatory FMLA recordkeeping and notification requirements reported a moderate to significant cost burden, with annual estimated costs per employer ranging from \$213,188 to \$1.3 million, excluding employer costs for complying with other existing federal recordkeeping and reporting requirements.

Doc. 10107A, at 2–3.

Moreover, as was noted in the RFI, Westat found that establishments with more than 250 employees experienced greater negative impacts on productivity

⁴¹ Similarly, epidemiologists might find a problem due to the cluster of an illness in a specific locality or demographic group, even if the average incidence in the general population is low. Therefore, it is not sufficient to only examine the average impact on employers. It is also necessary to examine the impact on employers experiencing problems to determine if there is some pattern involved.

⁴² Janemarie Mulvey, *The Cost and Characteristics of Family and Medical Leave*, Employment Policy Foundation Issue Backgrounder (Apr. 19, 2005). But see Institute for Women’s Policy Research, *Assessing the Family and Medical Leave Act: An Analysis of an Employment Policy Foundation Paper on Costs* (June 29, 2005).

⁴⁰ *See also* Chapter IV.

and profits than smaller establishments covered by the Act. Criterion Economics presented an analysis stating that “[i]n reporting its results, the Westat survey weights the results by the number of establishments, a weighting scheme that biases the overall results in favor of responses provided by small establishments, as there are far more small firms than large firms in the United States. *** weighting the Westat survey results by employment has a large effect on the reported impact.” National Coalition to Protect Family Leave, Doc. 10172A, Attachment at 14–15.

I. Impact of Unscheduled Intermittent FMLA Leave

As discussed in Chapter IV, the Department received a variety of comments regarding the impact of unscheduled intermittent FMLA leave. At the same time, notice issues notwithstanding, comments from employees demonstrate that it is the unpredictable nature of certain serious health conditions that makes the use of intermittent leave invaluable.

Representative of many employer comments, the National Business Group on Health described the impact of unscheduled FMLA leave this way:

Unscheduled leave presents different problems than scheduled FMLA leave because of the lack of advance notification and unpredictability of the employee’s time away from work. Furthermore, it creates significant problems if the employer cannot obtain adequate staffing. Additionally, the need for overtime or temporary personnel increases operating costs. With unscheduled leave, employers cannot give advance notice of the need for overtime to those employees who must fill in for the employees on FMLA leave, negatively affecting employee morale. Scheduled FMLA leave, on the other hand, gives the employer a better opportunity to plan, though it still raises operating costs. It allows an employer time to obtain coverage during an employee’s absence from the employer’s own staff pool and to administer the FMLA leave in a timely manner. Also, the other employees who fill in for colleagues on FMLA can better plan their overtime.

Doc. 10268A, at 2. *See also* South Central Human Resource Management Association, Doc. 10136A, at 7.

However, the Women’s Employment Rights Clinic at Golden Gate University School of Law provided this view of the benefits to workers of intermittent FMLA leave:

Intermittent and reduced schedule leaves are central to employees’ ability to balance work and family. * * * the opportunity to take leave in limited increments is extremely important to workers. In the case of one’s own medical needs, intermittent and reduced schedule leave allow employees to continue

working while undergoing medical treatments that require only partial absence from work. This not only gives the employee the opportunity to continue earning wages, but also to continue as an active participant in the workforce * * * For those who need only partial leave for care of a family member, such flexible leave arrangements give the worker the opportunity to maintain much needed earning capacity during periods of increased medical and caretaking expenses.

Doc. 10197A, at 6.

Keeping workers with chronic conditions employed not only benefits the workers themselves but also benefits society in the form of reduced public assistance payments. For example, one worker stated:

Without [the FMLA], I would have surely missed mortgage payments, car payments and my paycheck would definitely not have been enough to provide groceries for the family. The end result would be a damaged credit history in which my family and I would suffer paying higher costs of insurance and other means of credit, suffering for years and years, causing unresolved debt hanging over our heads. Not to say the least, without this protection, I probably would have lost my job and all its benefits due to the missed time at work.

An Employee Comment, Doc. 2666, at 1. Another worker stated:

My experience with the Act has been extensive as I used both intermittent and continuous leaves to care for my elderly mother * * *. Without this important benefit * * * [o]ur only alternative was to deplete Mother’s assets and apply for Medicaid which would put the financial responsibility of her care on the Federal Government. With this Act we feel we were able to accomplish our goals and avoid shifting the burden of care to the government.

An Employee Comment, Doc. 4720, at 1.

On the other hand, as explained in Chapter IV, many comments indicate that unscheduled intermittent FMLA leave is difficult for employers because employee absences can be unpredictable and occur with little or no notice. However, it is precisely the unpredictable nature of many serious health conditions that makes the ability to take unscheduled intermittent FMLA leave so important for employees.⁴³

J. Impact of Unscheduled Intermittent FMLA Leave on Productivity and Profitability

Although employer comments suggest that unscheduled intermittent leave is a problem, others pointed to data from the national surveys that suggest intermittent FMLA leave is not a

significant problem. Two types of data were submitted as evidence that employers are overstating the impact of intermittent FMLA leave: data on productivity and profits, and data on the use of intermittent FMLA leave.

For example, the AFL–CIO stated:

[A]lthough intermittent leave has now become a focal point of employer complaints about the FMLA, in our survey just 12 percent of all respondents reported having taken intermittent leave. This finding supports that available evidence, which shows that “intermittent leave is used infrequently and has imposed minimal burdens on employers.” Anne Wells, Note, Paid Family Leave: Striking a Balance Between the Need of Employees and Employers, 77 S. Cal. L. Rev. 1067, 1081 & nn.94–98 (2004). In fact, Westat found that “[a]bout a fourth of leave-takers (27.8%) had at least one intermittent leave during the [2000] survey reference period.” 2000 Westat Report at 2–18.

Doc. R329A, at 7–8.

As was noted previously, the use of averages tends to minimize the impact on some employers. The fact that relatively small averages of workers in the Westat employer survey and the AFL–CIO survey used intermittent FMLA leave may obscure the fact that some employers in some industries or workgroups are experiencing disruptive rates of unscheduled intermittent leave use.

Moreover, some commenters indicated that the use of unscheduled intermittent FMLA leave by a few workers can significantly disrupt the operations of their employers depending on their positions, duties, and the type of work being performed. As one HR manager stated, the regulatory “definition of ‘key employee’ * * * has to do with income level. The reality is our transit drivers are key employees because without them, the bus does not run. So I think I would change the definition of what is ‘key’. A policeman is key. A fireman is key. A transit driver is key.” Doc. 2627A, at 3. “[M]any positions only have one person or one person per shift in a job class. When this person is absent for any reason, specific duties do not get carried out for the company.” Infinity Molding & Assembly, Doc. 5192A, at 1.

Some commenters asserted that the problems being cited by the employers result more from management practices than the FMLA. For example:

- Cummins Inc. noted, “[i]t has been our experience that facilities that maintain stringent attendance management policies often experience the highest number of FMLA intermittent leave requests.” Doc. 10340A, at 2.

⁴³ See Joan C. Williams, One Sick Child Away From Being Fired: When “Opting Out” Is Not an Option, University of California, Hastings College of the Law, 2006, at 31.

• Madison Gas and Electric Company stated “[t]he belief that unscheduled, intermittent FMLA is increased due to poor management and labor-relations issues is valid. Employees may concentrate on chronic health issues more heavily if their work situation is not fulfilling or becomes difficult. It is very interesting when reviewing FMLA leave data to see an employee with a certain condition taking large amounts of intermittent, unscheduled FMLA leave and another with the same condition taking very little time.” Doc. 10288A, at 5.

As mentioned in Chapter IV, other comments indicate that certain provisions in collective bargaining agreements (CBAs), in conjunction with the FMLA, may provide an opportunity for employees to work particular times or shifts, and avoid others. These include: (1) provisions that provide that bargaining unit workers can receive premium pay (e.g., for working a holiday or a particular shift) without having to complete a 40 hour work week; and, (2) provisions that workers have to be paid a full day of pay regardless of the actual amount of time they are at work. For example:

• “Common practice is to take FMLA through the week but work on the weekends at 1.5 to 2.0 [times] the salary.” A Human Resource Manager Comment, Doc. 4917, at 1.

• “We even had one individual during our busy period of time (where overtime was abundant) come in four hours before the start of their shift (2 hours at double time and 2 hours at time and one half) and then at the start of their regular shift go home [on] FMLA. In that way she would earn seven (7) hours of pay and leave while not working the shift (2nd shift) that she hated.” An Employee Comment, Doc. 6A, at 4.

• “Take, for example, a Yardmaster who frequently calls in at the start of his or her shift stating [that] he or she will be using * * * intermittent FMLA leave. * * * Under the Yardmaster collective bargaining agreement, Yardmasters cannot work part of a shift and if a replacement is called, the replacement must be paid for the entire shift regardless of how long he or she is needed. Thus, the absent employee may say he or she only needs two hours of FMLA leave and is charged accordingly but ends up with eight hours off from work because the replacement works the entire shift. * * * Another similar scenario is presented when an employee’s health care provider indicates he or she cannot work more than four hours per day, for example, due to exhaustion * * * Again, a

replacement must be called and paid for the entire shift under the labor contract.” Union Pacific Railroad, Doc. 10148A, at 8.

• “Due to the ‘no penalty’ clause in FMLA, absent employees acquire ‘super seniority’ in many cases. For example: Our labor agreement allows us to deny holiday pay under certain conditions. Although the entire workforce is covered under the labor agreement, FMLA privileges afford special treatment to employees absent for FMLA reasons.” Interbake Foods, Doc. 10012A, at 2.

• “In the railroad industry, workers from the railroad’s pool or extra board are called in roughly two or three hours before they are needed (as prescribed in the pertinent labor agreement). Unfortunately, a railroad worker so inclined can use the existing regulatory scheme to repeatedly use very small increments of FMLA leave to avoid unwanted assignments—disrupting railroad operations and unfairly impacting his or her co-workers. For example, a worker could call in to the railroad at 1 a.m. and take FMLA leave (e.g., for a chronic migraine), thereby preventing the railroad from assigning him or her to a 3 a.m. train run (or whatever assignment that worker may find unpleasant). That same worker can then call back a short period later (as soon as the worker feels that he or she has safely avoided that assignment), knowing that he or she would be assigned a later train run—thus obtaining a more favored assignment[.]” Association of American Railroads, Doc. 10193A, at 6.

K. Specific Industries Report Difficulties With Unscheduled FMLA Leave

Some industries, and operations within industries, may have more problems with employees’ use of unscheduled FMLA leave than others. “[E]conomic theory and empirical research indicate that the costs of absenteeism vary depend[ing] on the characteristics of firm production functions.” National Coalition to Protect Family Leave, Doc. 10172A, Criterion Economics, Attachment at 18. “A regulation that reduces labor productivity, for example, will have a larger impact on economic welfare in industries where production requires ‘fixed proportions’ of capital and labor (e.g., air transport, which requires at least one pilot and one co-pilot per airplane) than in industries where capital can easily be substituted for labor.” *Id.*, at 6. Further, “[i]n some industries, employee absenteeism will have a relatively small effect on firms’

overall ability to operate, and therefore entail a relatively modest financial impact. In other sectors, absenteeism hinders production substantially by, for example, diminishing the productivity of other workers and equipment.” *Id.*, at 8.

The RFI record suggests that intermittent FMLA leave can have significant impacts on time-sensitive business models. For example, the United States Postal Service reported “[i]n a time-sensitive environment * * * unscheduled leave presents significant operational challenges.” Doc. 10184A, at 9. The United Parcel Service stated “employers typically can arrange coverage for an employee who might require intermittent leave to take his mother to regularly scheduled * * * treatments. However, it is a huge burden for management to cover for an employee who is certified for intermittent leave for chronic * * * [conditions] and who calls in with no advance notice * * * especially in time-sensitive / service-related industries.” Doc. 10276A, at 5.

In many situations, the absence of just a few employees can have a significant impact. For example, “[w]ith respect to unscheduled intermittent leaves, some employers find they have to over staff on a continuing basis just to make sure they have sufficient coverage on any particular day (such as hourly positions in manufacturing, public transportation, customer service, health care, call centers, and other establishments that operate on a 24/7 basis). Some employers are required to work employees overtime to cover the absent employee’s work. Both of these options result in additional costs[.]” Spencer Fane Britt & Browne LLP, Doc. 10133C, at 19.

The Department also received many comments discussing the benefits that FMLA leave has for workers in these industries, and some of the issues employees face trying to take FMLA leave in these industries. See Chapter XI.H.3; see also Chapter I. As noted earlier, often these benefits are immeasurable and priceless. Although they will not be repeated here, they should be taken into account.

Comments received in response to the RFI suggest at least four types of business operations appear to have particular difficulty with unscheduled intermittent FMLA leave: (1) Assembly line manufacturing; (2) operations with peak demand; (3) transportation operations; (4) and operations involving public health and safety.

1. Assembly Line Manufacturing

One commenter explained, if a single worker is missing or has to leave, the line may have to be shut down until a replacement arrives.

My company is a manufacturing facility * * * Unfortunately, the production process is often slowed down or brought to a halt when an employee is out on FMLA. Not all of our product lines have employees cross-trained to work there. Intermittent FMLA affects the employee's productivity if they are not able to work a full day to produce the product needed to meet the customer demands. Employees often do "double duty" to cover a team member who is out on FMLA, which in turn causes stress and feelings of resentment.

Cooper Bussmann, Doc. 247, at 1.

The National Association of Manufacturers summarized the problem for U.S. manufacturers in this way. "In the '24/7' environment of modern manufacturing, a night shift only makes sense when the day shift is fully staffed to take up and continue their efforts. Manufacturing and shipping schedules can be met only when staffing requirements can be predictably and reliably filled. But making sense of personnel requirements and scheduling needs has been made significantly more difficult by the current interpretations of the FMLA by the DOL[.]" Doc. 10229A, at 3.

Some comments said that problems such as those reported above are merely scheduling issues and are not really problems with the FMLA, and that employers should expect some workers to be absent each day and should hire, staff, and schedule accordingly. For example, the Center for WorkLife Law stated that "[e]mployers should not rely on co-workers to cover for absent employees as a matter of course. Rather, co-workers should be used to pick up the slack when no other option is available. Most employees will need to take FMLA leave at some point during their career, and good management practices dictate that employers recognize this eventuality and plan for it." Doc. 10121A, at 7.

Employer commenters had a different view.

Given the need for U.S. manufacturers to control costs and compete in a global market, we do not have the luxury of having a 'pool' of surplus employees to cover for unplanned absences. Six to seven years ago we were able to have a few employees in a floater pool for flexibility, but [with] the utilization of lean manufacturing techniques [that enables] us to compete with foreign competition, we no longer have those 'extra' employees. I know most, if not all, of the manufacturing people that I interact with in our State no longer have this luxury.

Ed Carpenter, Human Resources Manager, Tecumseh Power Company, Doc. R123, at 1.

Companies with production lines have no useful work for an employee who reports to work a few hours late. For example, a manufacturing facility begins its production line at the start of the shift. Within the first hour or two of the shift, the company needs to fill all job positions so that the production line can begin operations. An employee with a chronic condition * * * has an episode that causes him to take 2-4 hours of unscheduled FMLA leave * * * By the time the employee reports to work * * * all jobs on the production line have already been filled and there is no work for the employee. If the employee is permitted to 'bump' the person assigned to do his tasks, then the employer is still left with another employee with nothing to do.

Clark Hill Inc, Doc. 10151A, at 2.

Honda's comments indicate that employers could incur substantial costs even when there are floaters available to keep the line moving.

[B]ecause all work stations must be covered in assembly-line manufacturing, employers must have extra workers to cover possible unscheduled, intermittent leave * * * Such absences increase the costs of manufacturing by increasing the number of extra employees who have no regular work but are "floaters" to cover for unscheduled absences * * * Furthermore, because those "floaters" or "fill-in" workers are not as experienced or knowledgeable, they may not be able to keep up with the normal pace * * * Because they move from department to department depending upon the need, they cannot be expected to have proficiency of an associate regularly assigned to that process. Therefore, production units may be lost, and, to make up for the lost units, the whole department or shift may have to work overtime. The employees in attendance are inconvenienced, and the employer has incurred increased costs for the same number of units.

Doc. 10255A, at 4-5.

2. Operations With Peak Demand

Commenters noted that in contrast to assembly line manufacturing, some operations primarily experience problems with unscheduled intermittent FMLA leave during their periods of peak demand. At other times, such leave can be more easily accommodated. Two examples are electric utilities during power outages, and call centers.

Although power interruptions are, in many cases, unavoidable, Exelon's customers expect the restoration of power as quickly and safely as possible. Indeed, in some cases, a customer's safety and wellbeing are dependent upon the prompt restoration of service. * * * The nature of Exelon's business requires employees to work overtime, particularly employees who are responsible for restoring electrical service to customers or who are responsible for

responding to customer inquiries regarding electrical service. When employees with these duties are unable to work overtime [because of FMLA medical certifications], their co-workers have to pick up the burden * * * Simply put, when a customer is without power in the middle of the night, Exelon does not have the option of deciding to restore the customer's power the next morning, when the employee needing FMLA leave from overtime is able to come to work.

Exelon, Doc. 10146A, at 1 and 3.

Our company has several divisions, with the one being impacted the most by FMLA our call center. The call center is staffed by call volume and based on the expected minutes of an employee's time on the phone during a shift. Intermittent FMLA in this division causes problems with phone coverage. This frequently means that we * * * have to offer overtime to employees who will cover someone's shift (whenever enough notice is given), resulting in increased wage expenses. Another scenario is that our service level agreements with our customers suffer the consequences of our center being understaffed. This has a more long-term effect that may result in our customers not renewing contracts with our call center.

Leslile Masaitis, Doc. 224, at 1.

Moreover, it is impossible to calculate or repair the loss of goodwill that results from frustrated customers who are kept waiting for [call center] service and from disappointed customers whose needs remain unmet because of the absences. In one office, in one month alone in 2006, intermittent FMLA absence resulted in over 8,900 unanswered calls.

Verizon, Doc. 10181A, at 4.

3. Transportation Operations

The Department received a number of comments indicating there are unique FMLA issues for the transportation industry. Typically, the plane, bus, or train cannot leave until the crew is present. Many commenters pointed out that any delay in staff can result in a delay that inconveniences many passengers and customers. Moreover, if the individual taking FMLA leave arrives after the departure, there may be no work for that individual for several hours.

Our customers depend on us to get them to work, school or medical appointments on time. When drivers are late to work * * * their route must quickly be given to another driver, and the bus must get out on the road. This can mean that a busload of people is late. * * * Employers in time-sensitive industries such as public transportation whose existence depends on being able to make pull-out (getting the buses out on the road, particularly at peak ridership times); arriving at destinations on time; meeting up with other buses on schedule, etc., are really in a bind when an employee can circumvent rules by calling in to the dispatcher and

simply saying "I'm running late because of FMLA."

Metro Regional Transit Authority, Akron, Ohio, Doc. 10118A, at 1.

Unforeseen, intermittent FMLA leave is not only having a negative impact upon our operations, but also upon our customers, the general public. When bus operators report off work, in many instances, at the last possible moment, a bus may be late or not show at all. Additionally, extra operators must be scheduled to work in anticipation of coworkers calling off work. These costs are critical to nonprofit organizations that rely, to some degree, upon government funding. The current provisions for intermittent leave present a significant burden to schedule-driven operations.

The Port Authority of Allegheny County, PA, FL135, at 2.

Three workgroups represent 82% of all FMLA leave at Southwest and each of them has operational job responsibilities: Ramp, Operations and Provisioning Agents; Reservations Sales Agents; and Flight Attendants * * * When these employees take FMLA, it directly impacts Southwest's ability to operate our published flight schedule, much less on time and with efficiency. When these employees are absent, flights do not take off without another employee taking their place * * * the replacement staffing costs alone represent approximately \$20 million annually * * * Southwest estimates that it must employ and pay as many as 200 additional Reserve Flight Attendants each month to cover intermittent FMLA.

Southwest Airlines Co., Doc. 10183A, at 3, 5.

An office worker who shows up one hour late for work may find some extra paperwork on his desk which he can handle during the day without affecting others. A flight attendant who reports at 10 a.m. for a 9 a.m. departure has almost certainly created significant operational problems. He has either (a) forced 100-400 passengers to wait and miss later connections, or (b) caused the airline to reposition another flight attendant onto the aircraft because, by federal regulation, an aircraft cannot board passengers or take off without a minimum number of flight attendants. The ripple effects of such delays also can affect an infinite number of passengers, as well as numerous coworkers * * * in cases where airline employees work on planes that have left the airport, it is physically impossible for an employee to report to work on a plane that has taken off.

Air Conference, Doc. 10160A, at 4, 11.

There are 55 employees in our workforce. * * * Three are [on] FMLA [leave]. * * * Buses don't leave the garage without drivers. Buses are not properly maintained without enough mechanics. Therefore we have to hire more people to get the job done while we wait to see if the four that are off will ever come back. If they do, we have to lay off the people that we hired and trained to do the job.

The Transit Authority, Huntington, WV, FL 3, at 1.

4. Operations Involving Public Health and Safety

The RFI record indicates that unscheduled intermittent leave can have an adverse impact on operations involving public safety. There are numerous examples in the record describing the impact of such leave on police, fire, correctional and health operations.

a. Hospitals, Clinics and Long-Term Care Facilities

Unscheduled leaves of absence, whether covered by the FMLA or not, naturally present staffing and operational difficulties, particularly for hospitals and other health care facilities that must provide treatment and services for patients' medical needs * * * for many years, the health care industry has been confronted with a serious nursing shortage. Therefore, hospitals and other health care facilities must supplement their regular nursing staffs through the use of nurse agencies in order to satisfy patient:nurse ratios in order to provide optimal patient care and treatment. It can be very difficult, however, to have an agency nurse assigned to a facility in a timely manner when a nurse experiences an unforeseeable absence, particularly in situations requiring nurses with specific expertise in a clinical area. In addition, when non-licensed (i.e., non-nursing) clinical staff experience unforeseeable absences, nurses and other staff members are often required to cover their duties, as it can be equally difficult to schedule a replacement employee in a timely manner to meet patient needs. Clearly, these situations impose significant stress on a workforce responsible for delivering optimal patient care.

Medstar Health, Doc. 10144A, at 11-12.

The Commonwealth of Pennsylvania expressed concern about the use of unscheduled intermittent FMLA leave making it difficult for hospitals to maintain necessary staffing levels. "Some of our 24/7 direct care operations also experience difficulty in meeting federally mandated staffing standards of the Commission of Accreditation of Healthcare Organizations because of the intermittent use of FMLA." Doc. 10042A, at 3. Allina Hospitals and Clinics expressed concern about the impact of unscheduled FMLA leave on patient care. "The great majority of Allina's employees work at hospitals and clinics and are involved in direct patient care * * * These provisions make it very difficult to ensure that hospitals and clinics will be adequately staffed. * * * Yet, Allina has had to allow emergency room staff, surgical support staff, nurses, physicians and ambulance drivers to take this extensive, unplanned leave * * *

regardless of the impact on patient care." Doc. 641, at 1.

- The concern about patient care was also mentioned in the comments by Hinshaw and Culbertson. "[W]e have conducted a formal survey of our clients with respect to the questions raised in the **Federal Register** * * * The general concern with unscheduled leave * * * and intermittent leave * * * [is] patient safety (at healthcare entities) can become a problem when staffing is low or when temporary employees are used[.]" Doc. 10075A, at 1 and 3.

- Long term care (LTC) "employers distribute work among its staff or hire agency staff to care for patients. Full time employees may be offered incentives beyond overtime pay, or staff may be brought in from affiliated employment sites, which means that travel costs must be covered. LTC employees provide direct care to frail, elderly and disabled individuals who are in need of clinically complex, special care. Therefore, when employees take FMLA leave, adequate numbers of trained replacement staff are especially important. Notably, some states have specific minimum requirements for nurse to patient staff ratios in LTC facilities in order for Medicare/Medicaid beneficiaries to reside in these facilities. On the federal level, facilities must have 'sufficient staff' to provide nursing care to residents. Therefore, having adequate staff on hand not only is necessary to promote good patient care, but it is a state and federal mandate." American Health Care Association, Doc. 10321.

b. Other 24/7 Operations

Franklin County Human Resources cited correctional institutions and nursing homes. "Unscheduled leave is where the hardship lies in continuing normal operations. This is critical for a 24-hour operation. This is more difficult in our more service-based departments that include a Jail and Nursing Home. In these operations, we must have a proper number of nurses and corrections officers * * * [and] unscheduled absences * * * places demands on other employees they were not prepared for." Doc. FL59, at 5.

- The Indiana State Personnel Department cited correctional institutions and mental health facilities. "Operations of 24/7 facilities housing correctional offenders or persons with mental illnesses are adversely impacted by unscheduled intermittent FMLA leave due to legal requirements for specific staff/resident ratios and related safety issues." Doc. 10244A, at 3.

c. Emergency 911 Operations and Public Safety

The situation is particularly ominous when the employee works in a safety-sensitive position, such as 911 operators, or other employees requiring face-to-face relief, because if the person's shift is not able to be covered by a colleague who in some instances is required to work overtime, then the public may receive a slow response to an emergency call. Moreover, on certain holidays, during public events or declared emergencies * * * the NYPD must be able to double the size of its staff. Yet, the inordinate number of employees who call in sick for allegedly FMLA qualifying reasons on holidays * * * and during public emergencies * * * places the NYPD in a precarious situation of trying to balance between an individual employee's rights and public safety concerns. Moreover, when more than 20% of the employees on a shift call in claiming the need for an FMLA-related reason on the same day—which happens frequently on holidays such as New Year's Eve—the employer, in this case, the NYPD, may be left short-staffed and unable to provide the necessary safety-sensitive services to the public.

New York City, Doc. 10103A, at 5.

- New York City provided many other examples of “public safety sensitive positions” including police officers, firefighters, sheriffs and sanitation workers. *Id.*, at 2, n.1.
- A manager of a 911 center also expressed similar concerns. “The work in the 9–1–1 Center is very specialized and requires hundreds of hours of training. I cannot hire ‘temps’ from an office service to replace absent employees. The majority of absences require that I hire overtime, and often, that overtime is forced on employees. Currently, five of the seven employees assigned to day shift are on FMLA. Three other employees in the division (of 27 employees) are also on FMLA and another three have recently submitted FMLA paperwork for approval. With one exception, these medical conditions have not required hospitalization. Instead, these employees are given free license to call in sick on a day-to-day basis. And they do. Frequently. The remaining employees are working an enormous amount of short notice overtime and are denied their own personal and family time in order to cover these absences. The number of overtime hours being worked leads to overtired people making critical life and death decisions in an emergency driven environment.” Doc. 5193, at 1.
- The Fairfax County Public Schools provided the example of school bus drivers. “[T]he essence of a school bus driver's job is to deliver children to school on time and safely. A few bus drivers have used chronic conditions

such as CFS, depression, or sleep problems as an excuse not to report on time and not to call in when they will be late. They claim that their “condition” precludes them from providing notice or from being on time. These behaviors mean that children are often left waiting on street corners in all weather for some other bus driver.” Doc. 10134A, at 2.

L. The Impact of FMLA Leave Use in the Workplace

The 2000 Westat Report found that during a worker's FMLA leave, employers most frequently assign their work temporarily to other employees.

MOST FREQUENTLY USED METHOD TO COVER WORK WHEN AN EMPLOYEE TAKES LEAVE FOR A WEEK OR LONGER

	Percent
Temporarily Assign Work to Other Employees	74.5
Hire Outside Temporary Replacement Workers	18.0
Put Work on Hold Until Employee Returns	2.4
Some Other Method	4.3

Source: 2000 Westat Report, Table A2–6.5.

These results are consistent with the Society for Human Resource Management's more recent findings:

Employer approaches to covering work when an employee is on unscheduled intermittent leave vary based upon such factors as the nature and size of the employer's business, the employee's position, the number of individuals available to provide coverage in the employee's department, and business needs in that department. Employers may cover the leave-taker's work with: (i) Hiring a temporary worker; (ii) asking current employees to work overtime; (iii) spreading the work among current employees; or (iv) rearranging other employees' schedules to provide coverage. Sometimes, however, employers are unable to cover the work, particularly in situations involving unscheduled intermittent leaves. These situations can and do result in missed deadlines, lost production, and other business losses.

Doc. 10154A, at 7.

The 2003 Society for Human Resource Management survey found that assigning some work temporarily to other employees and hiring temporary outside replacements were the two most common methods used to cover the work of an employee absent on FMLA leave, with average ratings of 4.42 and 2.86 out of a possible 5, respectively. *Id.*, at 13.

Westat's employee survey also found that 32.1 percent of employees worked more hours than usual, and 22.9 percent

worked a shift not normally worked when co-workers took leave.⁴⁴ Moreover, 36.1 percent of workers felt that providing 12 weeks of unpaid leave for family and medical reasons was an unfair burden to employees' co-workers, and 15.1 percent of employees felt that their co-workers taking leave had a negative impact on them.⁴⁵

The comments submitted for the RFI supplement this record by providing greater details and insights on this issue. For example, Darby Associates commented that “[a]n important cost dimension is reflected in the burdens imposed upon fellow employees. These are not trivial * * * The record indicates that fellow employees who ‘fill in’ for unscheduled leave-takers are often obliged to miss professional appointments and family engagements. Employees also cite added workplace stress, resentment and uncertainty. There are considerable costs to employees that must work overtime or more intensely to cover for another employee ‘out’ on FMLA leave. This is especially true for unscheduled intermittent leave * * * employees are very unhappy when they believe that a fellow employee is gaming the system and forcing them to work extra when the person is abusing FMLA laws.” Doc. 10172A, Attachment at 26.

The record indicates if the morale of workers covering for the absent workers on FMLA leave begins to suffer, these workers may in turn seek and need their own FMLA certifications, causing an even larger impact on productivity and attendance. For example:

- Workers “also report that employees on unforeseen, intermittent leave indicate that they can and will misuse the system when they want to. As a result, more and more employees are applying for unforeseen, intermittent leave so they can take time off of work whenever they choose.” YellowBook, Doc. 10021A, at 1.
- “Productivity and services inevitably declined and morale suffered. Some of the over worked employees developed their own serious health conditions.” City of Portland, Doc. 10161A, at 2.
- “In larger companies, once employees understand that FMLA will allow the use of time off of work, without penalty and providing job protected leave, they have become savvy

⁴⁴ See 2000 Westat Report, Table 4.22 at 4–19.

⁴⁵ See *id.* at Table 4.20 at 4–18, and Table 4.23 at 4–20. It should be noted that 17.4 percent of workers felt co-workers taking leave had a positive impact and 67.4 percent felt it had no impact on them. Moreover, 63.9 percent did not feel that providing 12 weeks of unpaid leave was an unfair burden to co-workers.

with the use of FMLA to their benefit and they do not hesitate to let their co-workers know how it works.” First Premier Bank, Doc. 10101A, at 4.

• “We have had an employee request a week of vacation during the holidays and the request was denied because we had so many other employees off. Then the employee just called off for the entire week using FMLA, and then went on her vacation to Florida * * * Once one employee ‘gets away with it’, all employees are lined up at their doctors office to acquire intermittent FMLA leave.” Akers Packaging Service, Doc. 5121, at 1.

The issue of leave “contagion” as a behavior pattern is discussed in research cited in the RFI by Harold Gardner, et al., titled Workers’ Compensation and Family and Medical Leave Act Claim Contagion. It notes:

Economists and psychologists have been interested in why groups tend to engage in repeated behavioral patterns * * * The social barrier theory suggests that future claims will increase as prior claims break social barriers to claim filing. An example of a social barrier effect is a driver who wants to speed but does not because he fears the consequences of being caught or the increased probability of an accident. These concerns create a psychological barrier that he may not be able to cross even though there may be no police presence. If several speeding motorists pass the driver, he now finds it more psychologically acceptable to speed. “Contagion” occurs when an individual observes others taking an action that has not been possible for him to take because of a psychological barrier, and seeing others break the barrier itself increases his own ability to break it as well * * * an alternative economic view is claimant learning by proxy * * * A workers’ compensation claim by one member of a workgroup makes others more aware of its provisions for medical payments, disability pay, and rehabilitation services. A worker gains claimant capital through another workers’ claims, by proxy. In other words, workers learn about the benefits of workers’ compensation claims when their co-workers make workers’ compensation claims, and this information lowers future barriers of filing claims.

71 FR 69514.

According to CCH’s 2006 Unscheduled Absence Survey, “the rate

of unscheduled absenteeism climbed to its highest level since 1999, costing some large employers an estimated \$850,000 per year in direct payroll costs, and even more when lost productivity, morale and temporary labor costs are considered.” CCH estimates that 18 percent of unscheduled absences are due to personal needs, 12 percent due to stress, and 11 percent due to an entitlement mentality.⁴⁶

As discussed in Chapter IV, several commenters noted the misuse of intermittent FMLA leave for the purpose of avoiding mandatory overtime, and argued that this can have an adverse impact on their co-workers who are forced to cover for absent workers. However, some academic research postulates the negative attendance effects on those who are working to cover the absence of a person on FMLA leave may be related to new serious health conditions that arise—not additional misuse:

The loss of firm-specific human capital of the initial claimant places an increased burden on the workers in the group who remain because they must “pick up the slack.” The remaining workers may also be diverted from their assigned work if they have to train the replacement worker in those skills he needs to function as part of the group * * * The increased burden creates a higher stress environment. The stress felt by these workers may spread to other workers * * * Job-related stress has been found to be positively correlated with increased levels of coronary disease and mental illnesses * * * Stress can exacerbate preexisting conditions or cause new medical condition because of greater physiological pressure on the body created by psychological factors. Workers must exert more physical and mental effort to pick up the slack with the departure of the original claimant’s firm-specific human capital. The higher stress environment will lead to more illnesses and therefore more claims being filed under * * * FMLA * * * Stressed workers are more likely to be absent, as they leave the work environment temporarily to cope with the stress.

Harold Gardner, et al., Workers’ Compensation and Family and Medical Leave Act Claim Contagion, Journal of

Risk and Uncertainty, Volume 20, Jan. 2000.⁴⁷

Thus, based on the record, although some amount of contagion (i.e., the use of FMLA leave increases as more and more workers in a facility begin to take it) appears to be taking place, the causes of the increase are not certain. In addition to alleged misuse, the increase in the use of unscheduled intermittent FMLA leave seen in the data submitted by some employers could be due to other factors, such as workers suffering from the adverse health effects associated with the stress of staffing shorthanded operations.

M. Risk Management Analysis of Unscheduled Intermittent Leave

The techniques of risk management analysis and the concept of reasonableness can be used to explain how unscheduled intermittent FMLA leave can have different impacts on different employers, and account for such divergent comments about the economic impact and cost and benefits of the FMLA that the Department received in response to the RFI.⁴⁸

Figure 1, below, presents a standard risk management analysis matrix to illustrate how risk management principles apply to the issue of unscheduled intermittent FMLA leave.⁴⁹ It consists of four combinations of the probability (or rate) that unscheduled intermittent leave will occur, and consequences (is the cost high or low) associated with such leave for employers. In Block I, the probability that, or rate at which, unscheduled intermittent leave occurs is low, and the cost of such leave for employers is low. In Block II, the probability that, or rate at which, unscheduled intermittent leave occurs is higher, but the cost of such leave for employers remains low. In Block III, the probability that, or rate at which, unscheduled intermittent leave occurs is relatively low, but the cost of such leave for employers is high. Finally, in Block IV the probability that, or rate at which, unscheduled intermittent leave occurs is high, and the cost of such leave for employers is high.

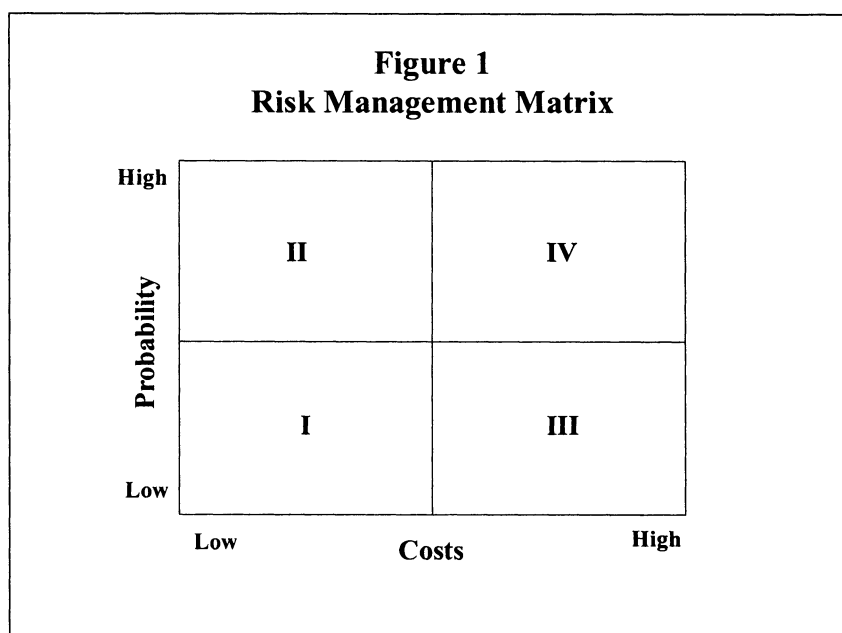
⁴⁶ CCH, 2006 CCH Unscheduled Absence Survey, available online at: www.cch.com/press/news/2006/20061026h.asp.

⁴⁷ See also National Institute for Occupational Safety and Health, STRESS* * * At Work, NIOSH Publication No. 99-101, available online at: www.cdc.gov/niosh/stresswk.html.

⁴⁸ See the concept of reasonableness discussed in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

⁴⁹ For more information on risk management matrices see, for example, Corinne Alexander and Maria I. Marshall, *The Risk Matrix: Illustrating the Importance of Risk Management Strategies*, *Journal of Extension*, April 2006, Volume 44 Number 2,

Article Number 2TOT1, available online at: www.joe.org/joe/2006april/tt1.shtml.



Based upon the available evidence, the Department believes that most FMLA covered establishments are in Block I with respect to the use of unscheduled intermittent FMLA leave. The data indicate that only a small portion of the workforce covered by the FMLA takes any form of FMLA leave, and even a smaller portion takes unscheduled intermittent FMLA leave. If an absence occurs, the reasonable employer will resolve these infrequent low cost events on a case-by-case basis by using the existing workforce (or possibly bringing in temporary help) to cover for the absent worker, and likely will view unscheduled intermittent FMLA leave as an expected cost of business. These establishments probably constitute most of the 81 to 94 percent of covered establishments that report that intermittent FMLA leave did not adversely impact either their productivity or profits, or may have had some positive effect.⁵⁰

For the establishments in Block II where the probability (or rate) of unscheduled intermittent leave is relatively high, but the overall cost to these establishments remains low because of the low cost associated with each absence, the reasonable employer may take steps to manage the leave (e.g., talk to the workers, get the workers to call in before taking leave), but will most likely continue to resolve these low cost events on a case-by-case basis. It is likely that these establishments also report that intermittent FMLA leave does not adversely impact either productivity or profits.

On the other hand, most of the establishments in the time-sensitive industries discussed above (see Chapter XI, section K) are probably in Block III. Although only a small portion of their workforce may take unscheduled intermittent FMLA leave, or is certified for a chronic condition, the cost of an absence by a worker is relatively high (e.g., the assembly line can not run as fast or it may take longer for the power to be restored). For the establishments in Block III, the overall cost is low if unscheduled intermittent leave does not occur, but high if it does. Here the reasonable employer is likely to take steps to reduce both the probability and the consequences associated with an absence. This may include more rigorous absence control systems and policies to discourage absences, overstaffing (e.g., the use of floaters or on-call workers), and the use of mandatory overtime to ensure that the time-sensitive operations are adequately staffed when some workers are unexpectedly absent. These establishments clearly incur some additional costs to mitigate the impact that unscheduled intermittent FMLA leave has on their operations, and likely report a small negative impact (4.2 to 5.4 percent of establishments) on either productivity or profits if an absence occurs.⁵¹

To the extent the Department received comments about how family-friendly policies and flexible schedules are good

⁵¹ See 2000 Westat Report, Table A2-6.13, at A-2-59. Some of these establishments may also report that intermittent FMLA leave has no impact on either productivity or profits if such leave does not occur very frequently.

for business (e.g., improve morale, employee retention, productivity, etc.), these comments are most likely from employers in Blocks I and II (pertaining to the majority of employees covered by the FMLA). However, reasonable employers in Block IV, who face the high probability of high cost absences associated with FMLA leave (e.g., a few workers taking leave that results in an assembly line being shut down for a shift), are not likely to be persuaded by comments that reflect a lower risk experience.

For those establishments and workgroups in Block IV with a high probability (rate) of unscheduled intermittent leave and where the cost of such leave is high, the comments suggest that none of the measures previously employed to reduce the risk and costs associated with unscheduled intermittent FMLA leave appears to work very well. Traditionally, employers have provided monetary incentives for workers to report (such as perfect attendance awards) and disincentives for workers not to report (such as an attendance point system).⁵²

⁵² The Department received many comments about the use of, or inability to use, perfect attendance awards due to certain regulatory provisions and interpretations. The Department interpreted the regulatory provisions on perfect attendance bonuses (section 825.220(c)) in Wage and Hour Opinion Letter FMLA-2 (Aug. 16, 1993):

With regard to attendance incentive plans rewarding perfect attendance, an employee may not be disqualified nor may any award be reduced for having taken unpaid FMLA leave. In a case where the bonus is expressed as an amount per hour worked, the employee on unpaid FMLA leave would receive a lesser amount than an employee who had not been on FMLA leave, as the employee

Continued

⁵⁰ See 2000 Westat Report, at 6-12.

These establishments, whose risk management systems (e.g., absence control policies, overstaffing, mandatory overtime) appear to be overwhelmed (e.g., Southwest Research Institute, Doc. 10077A), are likely the employers reporting that intermittent FMLA leave has a moderate to large negative impact on their productivity and profits (1.8 to 12.7 percent of establishments).⁵³ In

on FMLA Leave is not entitled to accrue benefits during FMLA leave. See § 825.220(c).

The Department has restated its position in several opinion letters since then. See, e.g., Wage and Hour Opinion Letter FMLA-31 (March 21, 1994), and Wage Hour Opinion Letter FMLA-110 (Sept. 11, 2000).

Several commenters suggested that no "problem" exists with respect to perfect attendance bonuses, and that employers ought simply to provide bonuses other than "perfect attendance" bonuses. See Elaine G. Howell, H.R. Specialist, International Auto Processing, Inc., Doc. 4752, at 2; International Association of Machinists and Aerospace Workers, Doc. 10269A, at 3; SEIU Local 668, Pennsylvania Social Services Union, Doc. FL105, at 3; Faculty & Staff Federation of Community College of Philadelphia, Local 2026 of the American Federation of Teachers, Doc. 10242A, at 4; American Association of University Professors, Doc. R31A, at 3; and National Partnership for Women & Families, Doc. 10204A, at 10-11.

Several commenters, on the other hand, objected to prohibiting FMLA-protected leave from counting against an employee for the purposes of a perfect attendance bonus. See The Southern Company, Doc. 10293A, at 12; Taft, Stettinius & Hollister LLP, Doc. FL107, at 5; National Public Employer Labor Relations Association, Doc. R358A, at 3-4; Porter, Wright, Morris & Arthur LLP, Doc. 10124B, at 3-4; G.S.W. Manufacturing, Inc., Doc. FL288, at 2; Fisher & Phillips LLP, Doc. 10262A, at 7-8; Edison Electric Institute, Doc. 10128A, at 4; and Carol Hauser, Senior Director of Human Resources, Miami University, Doc. 10032A, at 9.

⁵³ See 2000 Westat Report, Table A2-6.13, at A-2-59.

addition, many of their traditional methods to encourage or control absenteeism (e.g., perfect attendance awards or no fault attendance policies) are not permitted for FMLA-protected leave. A reasonable employer in this situation may seek changes to the regulations or the statute,⁵⁴ may try to make it difficult for their workers to take unscheduled intermittent FMLA leave by repeatedly questioning the medical certifications or asking for recertifications (see Chapter VI.B.1.c, and comments from: the Association of Professional Flight Attendants, Doc. 10056A; the International Association of Machinists and Aerospace Workers, Doc. 10269A; and the Communication Workers of America, Doc. R346A), and whenever possible, may require employees to use paid leave to cover their absences (see the joint comment on behalf of the International Association of Machinists and Aerospace Workers, the Transportation Communications International Union, the Transport Workers Union, and the United Transportation Union, Doc. 10235A; and the joint comment from the

⁵⁴ A similar analysis can be used to show why workers wanted Congress to pass the FMLA. Before the FMLA, a serious health condition could have been a catastrophic high cost event due to the potential loss of employment and health insurance. When women entered the workforce in greater numbers in the 1970's and 1980's, fewer families had an adult available to care for family members with serious health conditions, and the probability of families experiencing such a catastrophic event rose. Workers reacted reasonably by trying to limit this risk through the passage of legislation such as the FMLA.

American Train Dispatchers Association, the Brotherhood of Locomotive Engineers and Trainmen, the Brotherhood of Railroad Signalmen, the International Brotherhood of Electrical Workers, the National Conference of Fireman and Oilers, and the Sheet Metal Workers International Association, Doc. 10163A.).

As the risk analysis indicates, FMLA-related tension between employers and employees is at its highest for those entities in Block IV. More specifically, the comments confirm this tension arises, for the most part, due to unscheduled intermittent leave.

The tension can be traced to two competing needs that are true at the same time: (1) Employers' need for predictable attendance, particularly in certain industries; and (2) employees' need for unscheduled intermittent leave for their own or a family member's serious, chronic health conditions that flare up unpredictably and require absence from work. In some cases it appears these competing needs have resulted in employers and employees adopting a more adversarial approach in their FMLA interactions.

Signed at Washington, DC this 20th day of June, 2007.

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Assistant Secretary, Employment Standards Administration.

Paul DeCamp,

Administrator, Wage and Hour Division.

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